A TREATISE

ON THE

Law and Practice

RELATING TO

VENDORS AND PURCHASERS

OF

REAL ESTATE

BY THE LATE

J. HENRY DART.

THE SIXTH EDITION

BY

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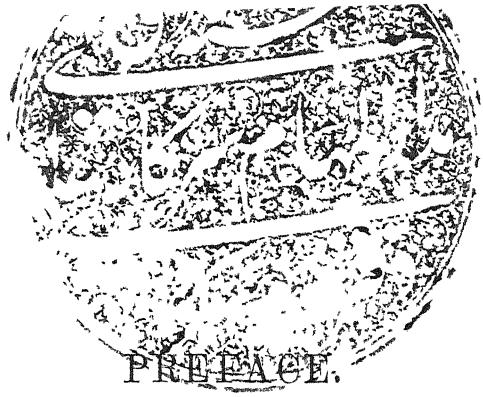

PREFACE.

When this Edition was projected, it was hoped that Mr. Dart would, as in the last two Editions, take an active part in the revision of the text; but failing health soon compelled him to relinquish altogether the task, when he had only made a few valuable suggestions on points raised in the first chapter. No one who was not placed in close relation to Mr. Dart, as was one of the present Editors from the time when he became a pupil in his chambers, can fairly judge how greatly the labour and the responsibility of bringing this Edition before the public have been increased through the want of the advice and help of the Author, whose profound legal knowledge, sound judgment, critical acumen, and lucidity of expression placed him in a position almost unrivalled among conveyancers.

The present Editors, fully alive to the increased responsibilities of their task, have co-operated in the endeavour to make this new Edition worthy of the Author's name and reputation, and to present it to

the profession and the public as an accurate and complete compendium of the present state of the law and practice relating to vendors and purchasers of real estate.

The general design and the method of arrangement of former Editions have been carefully preserved; but large portions of the book have been entirely re-written; considerable additions have been made to other parts; and, while recording judicial decisions down to the latest date, an attempt has been made to elucidate the principles on which such decisions depend and the tendencies towards further changes in the law.

The Chapter on Registration of Title, which appeared in the last, has been omitted from the present Edition; partly because Lord Cairns' Act, contrary to the expectations which were formed of it, has proved a complete failure, and will shortly be repealed; and partly because it is impossible at present to forecast the nature, extent, or effect of the changes which will be introduced by the proposed Government measure. But however drastic and comprehensive the coming reform may be, its practical effect on conveyancing transactions will be very gradual; and for many years to come the great bulk of the existing learning on the subject, of which this Edition aims at being an expo-

nent, will govern the practice of conveyancers. The Editors, fully convinced that the usefulness and value of their labours will not be lessened by the introduction of a system of compulsory registration of title, or by the other subsidiary changes in real property law which the introduction of such a system will necessitate, have deemed it right not to delay any longer the publication of this Edition, which they now leave to the generous consideration of its readers.

It only remains for them to acknowledge the great and valuable assistance which they have received from Mr. Charles Burney, who has revised the parts of Chapters XVIII., XIX. and XX. relating to the practice in Judges' Chambers; from Mr. J. W. Clark, of Lincoln's Inn, one of the joint authors of the recent work on Searches, for his revision of Chapter XI., dealing with that subject; and from Mr. Pattullo, of Lincoln's Inn, who has largely assisted in the preparation of an entirely new Index.

A new and fuller List of Statutes has been added, and it is hoped that the Table of Contemporary References in the Index of Cases will prove useful to those practitioners who have not the authorized Reports at their command. For the sake of brevity, and in order to confine as far as possible the dimen-

sions of the book, many of the abbreviations used in referring to Reports and Text Books are shorter than those commonly employed: but in order to obviate any difficulty that might possibly arise from this source, a full Table of the abbreviations used in this Edition will be found at p. xli.

The cases have by means of the Addenda been brought down to the present date.

LINCOLN'S INN,
January, 1888.

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TABLE OF ABBREVIATIONS.

A. & E. .....Adolphus & Ellis' Reports.
Act.....Acton's Reports.
Add. .....Addams' Reports.
Al. .....Aleyn's Reports.
Alc. & N. .....Alcock & Napier's Reports (Ireland)
Amb. .....Ambler's Reports.
And. .....Anderson's Reports.
Andr. .....Andrews' Reports.
Ann. .....Annaly's Reports, temp. Hardwicke, K. B.
Anst. .....Anstruther's Reports.
Ap. Ca. .....Law Reports, Appeal Cases.
Arn. .....Arnold's Reports.
Ast. Ent. .....Aston's Entries.
Atk. .....Atkyn's Reports, Sanders' ed.
Am. & Fer. ....Amos & Ferard on Fixtures, 3rd ed.
Amer. L. C. ....American Leading Cases, by Hare & Wallace, 5th ed.
Ann. Pr.....Annual Practice.

B. .....Beavan's Reports.
B. & Ad. .....Barnewall & Adolphus' Reports.
B. & Ald. .....Barnewall & Alderson's Reports.
B. & B. .....Ball & Beatty's Reports (Ireland).
B. & C. .....Barnewall & Cresswell's Reports.
B. & D. .....Benloe & Dalison's Reports.
B. & P. .....Bosanquet & Puller's Reports.
B. & P. N. R.....Bosanquet & Puller's New Reports.
B. & S. .....Best & Smith's Reports.
B. N. C.....Brooke's New Cases.
Bac. Ab. .....Bacon's Abridgment.
Barn. C.....Barnardiston's Reports, Chancery.
Barn. K. B. ....Barnardiston's Reports, K. B.
Barnes .....Barnes' Notes.
Bat.....Batty's Reports (Ireland).
Beat. .....Beatty's Reports (Ireland).
Bel. .....Bellewe's Reports.
Bell.....Bell's Appeal Cases (Scotch).
Belt .....Belt's Supplement to Vesey, sen.
Benl. .....Benloe's (or Bendloe's) Reports.
Bing. .....Bingham's Reports.
Bing. N. C. ....Bingham's New Cases.
Bitt. .....Bittleston's Practice Cases.
H. Bl.....Blackstone's (Henry) Reports.
W. Bl.....Blackstone's (Sir William) Reports
Bli. .....Bligh's Reports.
Bli., N.S.....Bligh's Reports, New Series.
Br. Abr.....Brooke's Abridgment.
Br. Ent.....Browne's Entries.
Br. C. C. .....Brown's Chancery Cases.
Br. P. C. .....Brown's Cases in Parliament.
Br. & B. .....Broderip & Bingham's Reports.
Bridg.....Bridgman's (Sir John) Reports.
Bridg. O. .....Bridgman's (Orlando) Reports.
Brownl. & G....Brownlow & Goldsborough's Reports.
Buck .....Buck's Bankruptcy Reports.
Bulst. .....Bulstrode's Reports.
Bunb.....Bunbury's Reports.
Burr. .....Burrow's Reports.
Benjamin .....Benjamin on Sales (3rd ed.).
Bl. Com.....Blackstone's Commentaries.
Blackburn .....Blackburn on Sales (2nd ed.).
Bray .....Bray on Discovery.
Bright's H. & W. Bright on Husband and Wife.
Browne & T.....Browne & Theobald on Railways.
Buckley .....Buckley on the Companies Acts (4th ed).
Burt. Comp. ....Burton's Compendium.

C. & E. .....Cababé & Ellis' Reports.
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ADDENDA AND CORRIGENDA.

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lxxx.—*Re Cameron and Wells* is referred to at p. 1014, not p. 631

18.—Sect. 30 of the Conv. Act, 1881, has been repealed, as to copyholds, by 50 & 51 Vict. c. 73, s. 45, the effect being to overthrow the decision in *Re Hughes*, W. N. (1884), p. 53, and to revive the old law of descent of trust and mortgage estates in copyholds as it existed prior to 1882.

23, n. (*f*).—Cf. *Allcard* v. *Skinner*, 36 Ch. D. 145.

42, n. (*h*).—For sect. 46 read sect. 48.

214, n. (*f*).—For *Bailey* v. *Chadwick*, 29 L. T., read *Bayley* v. *Chadwick*, 39 L. T.

215, n. (*g*).—And see *Beningfield* v. *Kynaston*, 3 Times L. R. 279.

222, n. (*e*).—*Soper* v. *Arnold* has been affirmed by the C. A., and is reported 36 W. R. 207.

263, n. (*f*).—*Wood* v. *Aylward* was reversed by the C. A. on the 25th Nov., 1887.

272, n. (*q*).—The reference to *Foligno* v. *Martin* should be to 22 L. J. Ch. 502. The report of the case in 16 B. 586 relates to another point on a further hearing.

281, n. (*q*).—The amount due for dilapidations may now be set off against the parson's retiring pension. See 50 & 51 Vict. c. 23, s. 6.

294—See Addenda to p. 18.

295, n. (*e*).—The reference to *Knollys* v. *Alcock* should be 5 V. 648; 7 V. 558.

308, n. (*g*).—For *Corble* v. *Byng* read *Webb* v. *Byng*.

314, n. (*s*).—*A.-G.* v. *Marquis of Ailesbury*, in the H. L., is now reported 12 Ap. Ca. 672.

325, n. (*a*).—*Bankes* v. *Small*, in the C. A., is now reported 36 Ch. D. 716.

389, n. (*m*).—*Re Rhodes* is now reported 36 Ch. D. 586.

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415, n. (*s*).—The reference to *Miner* v. *Gilmour* should be 12 Mo. P. C. 131.

425, n. (*p*).—For *Webber* v. *Scott*, read *Webber* v. *Lee*.

427, n. (*l*).—For *Teniel* v. *Harslop*, read *Leniel* v. *Harslop*.

443, n. (*x*).—And see *Re Hobbs*, 36 Ch. D. 553.

455, n. (*e*).—The reference to *Re Powers* should be 30 Ch. D. 291.

520, n. (*b*.)—And see *Brown* v. *Alabaster*, 36 W. R. 155.

599.—The statement in the last paragraph is not inconsistent with the very recent decision of the H. L. in *Commissioners of I. R.* v. *Glasgow & S. W. R. Co.*, 12 Ap. Ca. 315, viz., that the whole sum assessed by the jury as the price of land, inclusive of any sum awarded for loss or damage, is liable to *ad valorem* stamp duty. There is a clear distinction between the case where the compensation has been assessed only in respect of the land, and that where it has been awarded in respect of injury done to other land held with the land taken.

610, n. (*i*).—And see *Brown* v. *Alabaster*, 36 W. R. 155.

651, n. (*q*).—The reference to *Re Martin* should be erased.

655, n. (*r*).—*Re Platt* is now reported 36 Ch. D. 410.

657, n. (*a*).—See Addenda to p. 18.

659.—The second paragraph must be modified by reference to the Addenda to p. 18.

665.—The first sentence must be modified by reference to the Addenda to p. 18.

684.—The second paragraph must be modified as stated in the two preceding notes.

754, n. (*p*).—And see *Re Hotchkin's S. E.*, 35 Ch. D. 41.

702, n. (*x*).—For *The Hedgly*, read *Re Hedgly*.

767, line 26.—For *Sumton*, read *Sumpter*.

806, n. (*n*).—For *Re Stewart's Tr.*, read *Re Sewart's Tr.*

806, n. (*q*).—For *Ex p. Mihard's Devisees*, read *Ex p. Mehard's Devisees*.

819, n. (*s*).—It would seem that the country solicitor cannot obtain taxation of a part of his town agent's bill separately from the bill as a whole; *Re Johnson and Wetherall*, W. N. (1887), 241.

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819, n. (*u*).—Allowance of interest under the Solicitors' Remuneration Act, 1881, is regulated by Gen. Ord. VII., as to the construction of which see *Blair* v. *Cordner*, 19 Q. B. D. 516.

822, nn. (*s*) and (*t*).—As to the allowance of auctioneer's costs, see *Re Faulkner*, 36 Ch. D. 566, and the comments thereon in *Re Newbould*, 36 W. R. 161.

822, n. (*s*).—After *Re Waddall*, add reference to *Re Eley*, 37 Ch. D. 40; and at the end of the note add reference to *Re Harris, Powell and Goodale*, W. N. (1887), 29, 74.

855.—The distinction drawn in the second paragraph has been since taken in *Allcard* v. *Skinner*, 36 Ch. D. 145; see especially the judgment of Bowen, L. J., at p. 189 *et seq.*

858, n. (*s*).—For *Lord Beauchamp* v. *G. W. R. Co.*, read *Lord Carrington* v. *Wycombe R. Co.*

888, n. (*tt*).—*Bankes* v. *Small*, in the C. A., is now reported 36 Ch. D. 716.

911, n. (*k*).—*Bankes* v. *Small*, in the C. A., is now reported 36 Ch. D. 716.

935, n. (*o*).—For *Wilker* v. *Bodington*, 2 Vern. 559, read *Wilkes* v. *Bodington*, 2 Vern. 599.

944, n. (*l*).—The reference to *A.-G.* v. *Christ's Hosp.* should be 3 M. & K. 344.

946, n. (*y*).—*Bankes* v. *Small*, in the C. A., is now reported 36 Ch. D. 716.

1018, n. (*ss*).—*Re Cameron and Wells* is now reported 37 Ch. D. 32.

1024, n. (*h*).—*Ex p. Burnie*, read *Ex p. McBurnie.*

1030, n. (*g*).—For *Wych*, read *Wich.*

1064, n. (*x*).—The reference should be to *Emly* v. *Guy*, 3 Mer. 702.

1066, n. (*h*).—The reference to *Birt* v. *Burt* should be 11 Ch. D. 773, n.

1083, n. (*iii*).—*Rowe* v. *London School Board* is now reported 36 Ch. D. 619.

1089, n. (*f*).—*Soper* v. *Arnold* has since been affirmed on appeal, and is reported 36 W. R. 207.

1111, n. (*b*).—*Davies* v. *Davies* is now reported 36 Ch. D. 359.

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1118, n. (*c*).—*Banks* v. *Small*, in the C. A., is now reported 36 Ch. D. 716.

1119, n. (*r*).—Where the settlement was valid *ab initio*, but was avoided by the settlor's bankruptcy, the trustees were allowed, as against the settlor's trustee in bankruptcy, a lien on the trust property for their costs of defending an action previously brought by the settlor to set the settlement aside; *Re Holden*, 20 Q. B. D. 43.

1125.—The conclusion arrived at in the first paragraph of this page has now received judicial sanction; *Scott* v. *Morley*, 20 Q. B. D. 120.

1163, n. (*m*)—*Stick* v. *Swansea Tin Plate Co.* is now reported 36 Ch. D. 558.

1181, n. (*t*).—For *Nicholls* read *Micholls*.

1210.—In connection with the second paragraph, a reference should be made to *Union Bank* v. *Munster*, 37 Ch. 51, where the fact that unknown to the vendors a fictitious bid was made, and that in consequence the purchaser gave more than he had previously bid, was held to be no defence to an action brought by the vendors for specific performance.

1238, n. (*aa*).—*Re Jackson and Woodburn* is now reported 37 Ch. D. 44.

1348, n. (*s*).—For *In re Blackwell*, read *Blackwell* v. *Blackwell*.

1348, n. (*u*).—*Banks* v. *Small* is now reported 36 Ch. D. 716.

1352, n. (*b*).—For *Walters*, read *Watters*.

VENDORS AND PURCHASERS OF REAL ESTATE.

CHAPTER I.

Chapter I.

AS TO RESTRICTIONS ON THE GENERAL CAPACITY TO BUY OR SELL REAL ESTATE.

1. *Who are generally* } *incompetent to sell.*
2. *Who are relatively* }
3. *Who are generally* } *incompetent to purchase.*
4. *Who are relatively* }

THE questions who may sell, and who may buy, real estate, may be conveniently discussed, by assuming the existence of a general capacity to enter into the relation of vendor or purchaser; and by then treating of the exceptions from the general rule.

Incapacities to sell or buy are general or relative.

Incapacities to sell or buy may be considered as being of two descriptions: 1st, such as depend on some circumstance personal to the proposed vendor or purchaser, and affecting his general capacity to buy or sell any real estate whatsoever; and, 2ndly, such as depend on the relation in which he stands to the particular property about to be sold or bought; or to the party with whom he intends to deal.

Section 1.

(1.) *Who are generally incompetent to sell.*

Who are generally incompetent to sell

A proposed vendor, although having a good title to, and being the absolute owner of property, and standing in no

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Infants.

fiduciary relation towards the proposed purchaser, may yet be under some personal incapacity, which may prevent a sale; that is to say, he may be, 1st, An infant; if so, he can, as a general rule, execute no conveyance which will bind, either himself when he comes of age, or his heirs in the event of his dying, either under age, or of full age, but without having confirmed the transaction:—supposing it to be capable of confirmation (*a*).

Estates of, cannot generally be sold by Court.

Nor has a Court of Equity any authority to sell the real estate of an infant (*b*), under the mere notion that a sale will be beneficial (*c*). In some cases, however, where an infant has been entitled to an undivided share of realty of small value, the shares in which have been minute or numerous, a sale instead of a partition has been decreed, as being more advantageous to the infant; but, in order to create the jurisdiction, the infant's costs already incurred in the suit have, by the adoption of an expedient of somewhat doubtful validity, been first declared to be a charge on his share (*d*); and under the Partition Act, 1868 (*e*), the Court has power to order a sale, instead of a partition, notwithstanding the disability of any of the parties.

(*a*) Any deed which takes effect by delivery, is, if executed by an infant, voidable only; but letters of attorney, and deeds which delegate a mere power, and convey no interest, are absolutely void. *Zouch* v. *Parsons*, 3 Burr. 1794; *Anon.* v. *Hancock*, 17 V. 383; *Allen* v. *Allen*, 2 D. & War. 307; *Paget* v *Paget*, 11 L. R. Ir. 26.

(*b*) Or to sell an estate freed from a rent-charge to which an infant is entitled. *Wen* v. *Chamley*, 1 Ir. Ch. R. 298.

(*c*) *Calvert* v. *Godfrey*, 6 B. 97; and see *Brookfield* v. *Bradley*, Jac. 634; *Wood* v. *Patteson*, 10 B. 541; *Field* v. *Moore*, 7 D. M. & G. 691. As to sale under special circumstances, see *Garnstone* v. *Gaunt*, 1 Coll. 577; *infra*, Ch. XX. s. 1. As to mortgage of an infant's estate under special circumstances, see *Frith* v. *Cameron*, 12 Eq. 169; but see *Hibbert* v. *Cooke*, 1 S. & S. 552; *Harbron* v. *Combes*, 43 L. J. Ch. 336 As to the power of the Court to order a sale of an infant's reversionary interest in personal estate, see *Nunn* v. *Hancock*, 6 Ch. 850.

(*d*) *Thackeray* v. *Parker*, 1 N. R. 567; *Davis* v. *Turvey*, 32 B. 554; *Hubbard* v. *Hubbard*, 2 H. & M. 38; *Jackson* v. *Talbot*, 21 Ch. D. 786; but cf. *Steed* v. *Preece*, 18 Eq. 192.

(*e*) 31 & 32 V. c. 40, amended by the Partition Act, 1876 (39 & 40 V. c. 17). As to whether the Court could direct a sale on the request of an *infant* under the Act of 1868, s. 3, see *France* v. *France*, 13 Eq. 173; *Darey* v. *Wethsbach*, 15 Eq. 269; *Grove* v. *Comyn*, 18 Eq. 387; and see now sect. 6 of the Act of 1876, and *Wallace* v. *Greenwood*, 16 Ch. D. 362.

May convey under special statutes.

And, by statute, in particular cases, infants holding land in trust, or subject to the debts of their ancestor or testator, are enabled to convey, under the authority of the Chancery Division (*f*); so, too, by the Infants' Settlement Act (*g*), an infant may, with the sanction of the Court, make a valid and binding settlement of his or her real or personal estate in contemplation of marriage; and, in various special cases, infants, or their guardians, are enabled, by statute, to sell and convey land for purposes connected with religion (*h*), charity (*i*), instruction (*k*), literature, science, and the fine arts (*l*), or works of a public nature (*m*).

May exercise certain powers.

So, an infant can convey under a power simply collateral (*n*), or even under a power in gross or appendant or appurtenant, where an intention appears that it should be exercisable during minority (*o*); but he cannot be empowered, at least as against himself, to contract for the sale of land, or to do any other act which requires an exercise of discretion: and if he enter into a contract for the sale of lands, he cannot, during infancy, enforce it; as otherwise there would be no mutuality of remedy (*p*).

Under Conveyancing Act, 1881.

By sect. 41 of the Conveyancing Act, 1881, where a

(*f*) *Vide post*, pp. 656, 1346, n. (*k*).

(*g*) 18 & 19 V. c. 43.

(*h*) See, for a list of the Church Building Acts, the preamble to 17 & 18 V. c. 14 (now repealed). The powers of the Church Building Commissioners are now transferred to the Ecclesiastical Commissioners. 19 & 20 V. c. 55. As to sites for churchyards, see 30 & 31 V. c. 133. As to sites for churches, &c., ministers' residences, and burial places, see 36 & 37 V. c. 50, under which an infant, with the consent of his guardian, is empowered to convey; extended by 45 & 46 V. c. 21.

(*i*) See 16 & 17 V. c. 137, s. 27; 18 & 19 V. c. 124, s. 41; 23 & 24 V. c. 136; 24 V. c. 9.

(*k*) See 4 & 5 V. c. 38; 12 & 13 V. c. 49; 14 & 15 V. c. 24; 15 & 16 V. c. 49; and 6 & 7 Will IV. c. 90.

(*l*) 17 & 18 V. c. 112, s. 5.

(*m*) See 23 & 24 V. c. 112.

(*n*) Sug Pow. 177. As to whether an infant can exercise a power in gross over real estate, where no intention appears that it should be exercisable during infancy, see *Re D'Angiban*, 15 Ch. D. 228; Jessel, M. R., there held that he could, and on appeal James, L. J., apparently assented; but Cotton and Brett, L.JJ., were of a contrary opinion.

(*o*) *Re Cardross's Settlement*, 7 Ch. D. 728; *Re D'Angiban*, *supra*.

(*p*) *Flight* v. *Bolland*, 4 Russ. 298; and see this subject discussed *post*, p. 1161.

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person in his own right seised of, or entitled to, land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877; and his guardian may on his behalf execute the statutory powers subject to the restriction mentioned in the Act (*q*).

Under Settled Land Act.

By the Settled Land Act, 1882 (*r*), where a person, in his own right seised of, or entitled in possession to, land, is an infant, then, for the purposes of that Act, the land is settled land, and the infant is to be deemed to be tenant for life thereof; and the trustees of the settlement, or such person as the Court orders, may exercise on his behalf the powers conferred by the Act (*s*).

And may sell under custom of gavelkind.

But, by the custom of gavelkind, an heir at the age of fifteen may, for valuable consideration, sell, and convey for an estate in possession, lands which he took by descent; the conveyance being by feoffment, and livery of seisin being delivered by him in person (*t*).

Fraudulent sale by, relieved against, in Equity: *semble*.

An infant, however, has no privilege to commit a fraud (*u*); if, therefore, he were to sell and convey, asserting that he had attained his majority, the purchaser, it is conceived, would, if he had acquired the legal estate, be in Equity entitled to its protection (*v*): so, if the infant, having the legal estate, were to proceed at Law to recover the property, Equity would

(*q*) See sect. 49.

(*r*) See sects. 59 and 60.

(*s*) As to the construction of the words "entitled in possession to land" in sect. 59, see *Re Wells*, 31 W. R. 764; *Re Morgan*, 24 Ch. D. 114, and compare *Liddell* v. *Liddell*, 52 L. J. Ch. 207. As to the general principle to be adopted in construing the Act, see *Re Duke of Newcastle's Settled Estates*, 24 Ch. D. 129.

(*t*) 4 Bac. Ab. pp. 49, 50. *Quære*, whether the custom is not more comprehensive? see Consuetudines Kanciæ, 165; it extends to females, *ib.*, and is not affected by the 8 & 9 V. c. 106, s. 3. Elton's Tenures of Kent, pp. 82 *et seq.*, and see p. 168.

(*u*) Chambers on Infancy, 412; and see *Overton* v. *Banister*, 3 Ha. 503; *Campbell* v. *Ingleby*, 21 B. 573; and at Law, *Bristow* v. *Eastman*, 1 Esp. 172.

(*v*) See the judgment in *Hannah* v. *Hodson*, 9 W. R. 729, 733.

restrain the action, except upon the terms of his refunding the purchase-money; for instance, where an infant received a premium for a lease of his lands, upon his false assertion that the lessor was his guardian, Lord King decreed a return of the premium with interest (*u*). But, in the absence of any false assertion by the infant, relief in Equity will not be granted against him upon the ground that the other contracting party believed him to be of full age (*v*). The mere fact of an infant entering into a transaction which must necessarily be invalid unless entered into by an adult, is not such a fraud as entitles the other party to relief (*y*). There must be an express misrepresentation, and one which would naturally deceive the person to whom it is made (*z*): and where the false statement is made to a person who knows it to be false, there is no fraud committed which will take away the privilege of infancy. While on the one hand it is a legal indulgence which is not to be used by the infant for the purposes of fraud, so on the other hand it is not to be infringed upon by persons who, knowing of the infancy, must be taken also to know the legal consequences which attach to it (*a*). At Law, it has been held that even his fraudulent representation that he is of full age does not render him liable to an action by the party who has been thereby induced to contract with him (*b*).

If there be express misrepresentation.

By the 53 Geo. III. c. 141, s. 8, all contracts for the sale of any annuity or rent-charge by an infant were declared utterly void, notwithstanding any attempted confirmation after majority; and the intending purchaser was made guilty of a misdemeanor: but this Act is now repealed by the 17 & 18 Vict. c. 90. Before the repealing Act, the joint and

Could not sell annuity or rent-charge.

(*u*) *Eson* v. *Nicholas*, 1 De G. & S. 118.

(*v*) *Stikeman* v. *Dawson*, *ibid.* 90.

(*y*) *Stikeman* v. *Dawson*, *ibid*; *Wright* v. *Snowe*, 2 *ibid.* 321.

(*z*) *Ex parte Jones*, 18 Ch. D. 109; with which compare *Lempriere* v. *Lange*, 12 Ch. D. 675, where the misrepresentation as to age seems to have been implied, not express.

(*a*) *Nelson* v. *Stocker*, 4 D. & J. 458, and see *Inman* v. *Inman*, 15 Eq 260.

(*b*) *Johnson* v. *Pye*, 1 Sid. 258; *Liverpool Association* v. *Fairhurst*, 9 Ex. 422.

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several contract of an infant and an adult for sale of an annuity to a third party was valid as against the adult (*c*).

Infants' Relief Act, 1874.

By the Infants' Relief Act, 1874 (*d*), no action can now be brought "upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such ratification after full age." And it would seem that this enactment is to be construed literally as applying to all contracts, and not merely to contracts for the repayment of money lent, or for the payment of the value of goods supplied (*e*).

Lunatics, sales by, how far void or voidable.

Or, 2ndly, The proposed vendor may be a lunatic or idiot: in which case, according to the early authorities, his conveyance may be set aside by his committee during his life, or by his heirs after his death, and probably by himself if he recovers, at all events, as against a purchaser who had knowingly dealt with him as such. And it is now decided that the lunatic himself, as well as his representatives, may establish his lunacy in order to impeach a deed which he has executed (*f*). On the other hand, it has been held, at Law, that where a person, apparently of sound mind and not known to be otherwise, enters into a contract which is fair and *bonâ fide*, and is executed and completed, and the property forming its subject-matter cannot be restored so as to put the parties *in statu quo*, such contract cannot afterwards be set aside, either by the alleged lunatic or his representatives (*g*): and, in Equity, the result of the authorities seems to be, that sale-transactions with a person apparently sane, though afterwards found to be of unsound mind, will not be set aside against those who have dealt with him in the *bonâ fide* belief that he was of competent understanding (*h*). Nor will a sale or contract be

(*c*) *Haw* v. *Ogle*, 4 Taunt. 10; *Gillow* v. *Lillie*, 1 Sc. 597.

(*d*) 37 & 38 V. c. 62, s. 2.

(*e*) *Ex parte Kibble*, 10 Ch. 373; *Coxhead* v. *Mullis*, 3 C. P D. 439; *Ditcham* v. *Worrall*, 5 C. P. D. 410; *Belfast Banking Co.* v. *Doherty*, 4 L. R. Ir. 124, and *vide post.* p. 30.

(*f*) *Molton* v. *Camroux*, 2 Ex. 487, 501.

(*g*) *Molton* v. *Camroux*, *supra*; *Beavan* v. *M'Donnell*, 9 Ex. 309.

(*h*) See, particularly, *Elliott* v. *Ince*, 7 D. M. & G. 475; and see

invalidated, merely on proof that the person making it was subject to insane delusions, even though connected with the subject-matter, unless the delusions are found to be such as render him incompetent to deal with his property (*i*). But the above statement relates only to sale transactions; and it is the better opinion that a voluntary conveyance or a settlement by a lunatic will be treated as void, and not voidable, both at law and in equity (*j*).

Statutory powers of committees.

Under Lunacy Regulation Acts.

Until the statute 1 Will. IV. c. 65, s. 27, there was no mode of obtaining a conveyance from a vendor who became lunatic after entering into the contract (*k*). This statute was superseded by the Lunacy Regulation Act (*l*), which contains ample provisions enabling the committee, under an order of the Chancellor, to convey lands in performance of the lunatic's contracts (*m*), and to make sale, partition, or exchange of his undivided share in any land (*n*), and to sell for building purposes any land of or to which he is seised or entitled in fee simple (*o*). It seems doubtful whether this last provision will include land over which the lunatic has an absolute

also *Nell* v. *Morley*, 9 V. 478; *Williams* v. *Wentworth*, 5 B. 325; *Selby* v. *Jackson*, 6 B. 192, affd. 201; *Sutance* v. *Pole*, 3 C. & P. 1; *Price* v. *Berrington*, 3 M. & G. 486, 497, 498; *Campbell* v. *Hooper*, 3 S. & G. 153. In *Frost* v. *Beman*, 17 Jur. 369, the Court on a purchase by a lunatic rescinded the contract, and ordered the deposit to be returned (the vendor's expenses being first deducted); but this, as the author is informed, was by arrangement, it being understood that the vendor sold with notice of the insanity. And as to relief against a purchaser on the ground of the vendor's insanity, see *Price* v. *Berrington*, *supra*; *Wright* v. *Pound*, 13 V. 136. As to partial insanity and lucid intervals, see *Selby* v. *Jackson*, *supra*; *Creagh* v. *Blood*, 2 J. & L. 509; *Steed* v. *Calley*, 1 Ke. 620; and *Frank* v. *Mainwaring*, 2 B. 115. A purchaser who has contracted with a lunatic before he became insane may obtain specific performance in the form of a declaration, *Hall* v. *Warren*, 9 V. 605, and a vesting order. See *Mason* v. *Mason*, 7 Ch. D. 707.

(*i*) *Johnson* v. *Morris*, 14 Ch. D. 671. As to the distinction in this respect between executed and executory contracts, see *Matthews* v. *Baxter*, L. R. 8 Ex. 132.

(*j*) *Elliott* v. *Ince*, *supra*.

(*k*) As to the effect of a fine levied or a recovery suffered by a lunatic, see Pope on Lunacy, p. 232.

(*l*) 16 & 17 V. c. 70; see, too, 25 & 26 V. c. 86, s. 1; and Lunacy Orders, 1883.

(*m*) Sect. 122.

(*n*) Sect. 124.

(*o*) Sect. 125. As to what is a sale under this Act, see *Re Smith*, 10 Ch. 79. Under sect. 124 an exchange may be made, reserving the minerals under the land of the lunatic; *Re Dixonson*, 15 Ch. D. 316.

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power of appointment, or land conveyed to him to uses to bar dower; but in the latter case the dower trustee might of course release his estate (*o*). By the Lands Clauses Consolidation Act, 1845 (*p*), committees of lunatics are empowered to sell and convey; and by the Leases and Sales of Settled Estates Act (*q*), they may, by the special direction of the Court, exercise the powers given by that Act for the leasing and sale of settled lands. Committees must be careful not to exercise their statutory powers without the consent of the Chancellor (*r*).

Under Leases and Sales of Settled Estates Act.

Under Settled Land Act.

By sect. 62 of the Settled Land Act, where a tenant for life, or a person having the powers of a tenant for life under the Act, is a lunatic so found by inquisition, the committee of his estate may, under an order to be obtained by petition, exercise the powers of a tenant for life (*s*).

As to acknowledgment by lunatic *feme covert*.

It is now decided that the Lord Chancellor, in directing a sale of the real estate of a lunatic married woman, under the Lunacy Regulation Act, 1862 (*t*), has no power to dispense with her acknowledgment of the deed, and can only vest in the purchaser an equitable fee binding on herself and her heir (*u*).

(*o*) This provision does not extend to land of which the lunatic is tenant for life only; *Re Corbett*, 1 Ch. 516. The original jurisdiction in lunacy is superseded by the Act, *ibid.* Where a lunatic was tenant in tail of an undivided share of an estate, and an action was brought for partition, the committee was authorized to join in requesting a sale under sect. 4 of the Partition Act, 1868, and in conveying to the purchaser; *Lillingston* v. *Pares*, 12 Ch. D. 333; and see *Re Bloomar*, 2 D. & J. 88, and *Re Barker*, 17 Ch. D. 241. The Court has jurisdiction to bar the estate tail of a lunatic, but in doing so it will have regard to the interests of the remaindermen. *Re Sherard*, 1 D. J. & S. 421.

(*p*) 8 & 9 V. c. 18, s. 7. Where a vendor is a lunatic, and no committee has been appointed, the purchase cannot safely be completed without the intervention of a Court of Equity; *M. R. Co.* v. *Osum*, 1 Coll. 74, and see *Re Tuguell*, 27 Ch. D. 309.

(*q*) 40 & 41 V. c. 18, which consolidated and amended the Acts of 1856, 1858, 1864, 1874 and 1876; see *post*, p. 1278.

(*r*) *In re Wade*, 1 H. & Tw. 202. An action cannot be brought by a next friend on behalf of a person of unsound mind not so found by inquisition, for the purpose of dealing with his real estate; see *Halfhide* v. *Robinson*, 9 Ch. 373.

(*s*) Where there are no trustees of the settlement, trustees must be appointed; *Re Taylor*, 31 W. R. 596.

(*t*) 25 & 26 V. c. 86, s. 13.

(*u*) *Re Stables*, 4 D. J. & S. 257; see also 16 & 17 V. c. 70, s. 116.

Married women:—Estates of, how conveyed.

Or, 3rdly, The proposed vendor may be a married woman, in which case her capacity to contract will depend on whether she was married before or after the 1st of January, 1883, on which date the Married Women's Property Act, 1882 (*x*), came into operation; and further, in the former alternative, whether the property of which she seeks to dispose is property the title to which, whether vested or contingent, and whether in possession, reversion or remainder, has accrued before or after that date. In such cases she is subject to the old Law, and may, with her husband, convey her freehold estates under the 3 & 4 Will. IV. c. 74 (*y*); but any other conveyance by her is, at Common Law, absolutely void (*z*). And where a ward of Court married without consent, and, after attaining twenty-one, executed, by the direction of the Court, a settlement of real estate to which she was equitably entitled, but did not acknowledge the deed, it was held that her heir was not bound (*a*).

Customary power of alienation.

As to copyholds.

Before the Fines and Recoveries Abolition Act, in many places a married woman had a customary power, with her husband's concurrence, to dispose of land by deed acknowleged before the local authorities (*b*), and this power, it would seem, was unaffected by the Act (*c*). Her copyhold estates would pass by her surrender, with her husband's concurrence; or, if her interest were merely equitable, either by such a surrender or by deed acknowledged under the Act; and her legal terms for years, as well reversionary (*d*) as in possession, would pass by the sole assignment of her husband (*e*); though whether they would have been bound by his contract, in the event of his death in her lifetime and before conveyance, seems to be doubtful (*f*); and in order that a reversionary term might pass by his assignment, it must have been

(*x*) 45 & 46 V. c. 75.

(*y*) As amended by the Conveyancing Act, 1882, s. 7.

(*z*) Burton's Comp. pl. 206; see judgment in *Zouch* v. *Parsons*, 3 Burr. 1805.

(*a*) *Field* v. *Moore*, 7 D. M. & G. 691.

(*b*) See 1 Rop. H. & W. 140.

(*c*) See sect. 78.

(*d*) *Dubirley* v. *Day*, 16 B. 33; *Re Bellamy*, 25 Ch. D. 620.

(*e*) Burton's Comp. pl. 895; *Hill* v. *Edmonds*, 5 De G. & S. 603.

(*f*) *Post*, p. 1122.

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such an one as could possibly vest in possession during the coverture (*g*). As respects her equitable terms for years, in order to perfect the title, it was necessary for her to join in and acknowledge the assignment; for although the husband's sole assignment would bind her right by survivorship (*h*), it would not displace her equity to a settlement (*i*).

Their power to contract as to real estate.

The principle of the disability of coverture was that, in the eye of the law, until it was altered by the recent Act, a man and his wife were but one person; she was disabled to contract with anyone, without the consent of her husband; *omnia quæ sunt uxoris sunt ipsius viri* (*k*). Under the 77th section of the 3 & 4 Will. IV. c. 74, she became capable, with her husband's concurrence, of contracting in Equity, if not at Law, so as to bind her real estate, though not so as to render herself personally liable for breach of contract (*l*).

May be restrained from alienation.

And although the legal and equitable fee simple be vested in a married woman, she and her husband may, nevertheless, be unable effectually to assure it to a purchaser: as where the property is held under a will or settlement which forbids alienation during coverture; for such a restriction is binding, although no trustee be interposed (*m*): nor had the Court any power before the recent Act to dispense with it (*n*): nor, except in the case of a partition action (*o*), can trustees, during

(*g*) *Duberley* v. *Day*, 16 B. 33.

(*h*) *Donne* v. *Hart*, 2 R. & M. 360; *Duberley* v. *Day*, 16 B. 33, 41.

(*i*) *Hanson* v. *Keating*, 4 Ha. 1; *Wortham* v. *Pemberton*, 1 De G. & S. 641.

(*k*) *Cahill* v. *Cahill*, 8 Ap. Ca. 420, 425.

(*l*) *Crofts* v. *Middleton*, 8 D. M. & G. 192, 219; see judgment of L.-J. K. Bruce.

(*m*) *Baggett* v. *Meux*, 1 Ph. 627; *Steedman* v. *Poole*, 6 Ha. 193; *Re Gaskell's Trusts*, 11 Jur. N. S. 780; and *Re Ellis' Trusts*, 17 Eq. 409. And see now this subject considered in *Re Boun*, 27 Ch. D. 411, where *Re Clarke's Trusts*, 21 Ch. D. 748, and *Re Croughton's Trusts*, 8 Ch. D. 460, are discussed; see also *Re Spencer*, 30 Ch. D. 183, as to the effect of a restraint on anticipation where there is an *absolute* gift of a fund producing income; and see *Re Grey's Settlements*, 34 Ch. D. 712.

(*n*) *Robinson* v. *Wheelwright*, 6 D. M. & G. 535; see, however, *Sanger* v. *Sanger*, 11 Eq. 470, a case under the Married Women's Property Act, 1870.

(*o*) *Fleming* v. *Armstrong*, 34 B. 109, where her costs of action were made a charge on her share, in order to give the Court jurisdiction to direct a sale.

coverture, safely part with a fund which is affected by such restraint (*p*). And even where the wife was guilty of gross fraud, by which an innocent purchaser was led to believe that there was no such restraint, it was held that by no device could it be evaded (*q*).

Effect of recent Acts on the restraint.

A restraint on anticipation does not prevent a married woman from exercising the powers conferred on her by the Settled Estates Act, 1877 (*r*), and the Settled Land Act, 1882 (*s*). And by sect. 39 of the Conveyancing Act, 1881, the Court may, notwithstanding that a married woman is restrained from anticipation, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property. It has been held, that where a married woman has contracted debts to a considerable amount, and these debts and the pressure of creditors annoy her, an application under this section may be acceded to (*t*); but the power will not be exercised where the removal would be simply for the benefit of the husband (*u*).

May convey under power.

But a married woman might, in exercise of a power, pass either a legal estate, by limitation of an use, or an equitable estate: and a general power of appointment authorized an appointment during coverture, unless the terms of the instrument creating the power were clearly inconsistent with such an exercise of it (*x*); and, after considerable conflict of opinion, the rule in Equity was that a married woman, not restrained from alienation, had, as an incident of her separate estate and without any express power, as complete a power of disposing of her equitable fee as if she were a *feme sole* (*y*); but of

May dispose of separate estate.

(*p*) *Re Gaskell's Trusts*, 11 Jur. N. S. 780; *Kenrick* v. *Wood*, 9 Eq. 333.

(*q*) *Stanley* v. *Stanley*, 7 Ch. D. 589; see also *Jackson* v. *Hobhouse*, 2 Mer. 488, per Lord Eldon.

(*r*) 40 & 41 V. c. 18, s. 50.

(*s*) 45 & 46 V. c. 38, s. 61, sub-s. 6.

(*t*) *Hodges* v. *Hodges*, 20 Ch. D. 749.

(*u*) *Tamplin* v. *Miller*, 30 W. R. 422; and see generally *Sedgwick* v. *Thomas*, 48 L. T. 100; *Musgrave* v. *Sandeman*, 48 L. T. 215; *Re Flood's Trusts*, 11 L. R. Ir. 355; *Re Warren*, 52 L. J. Ch. 928; *Re Currey*, 56 L. T. 80; *Re C.'s Settlement*, *ib.* 299; *Re Segrave's Trusts*, 17 L. R. Ir. 373.

(*x*) *Gould* v. *Gould*, 2 Jur. N. S. 484.

(*y*) *Taylor* v. *Meads*, 4 D. J. & S. 597; in which case Lord Westbury reviewed the earlier decisions and overruled *Buckell* v. *Blenkhorn*, 5 Ha.

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course a married woman would not have been regarded as a *feme sole* in respect of the fee simple, unless it were clear that the fee simple, and not merely the life estate, was limited to her separate use (*z*); and, if tenant in tail, with a restraint on anticipation during her life, she might nevertheless bar the entail (*a*).

Under the Conveyancing Act.

Under the Conveyancing Act, 1881, a married woman may now convey freehold land or things in action to her husband, and a husband may in like manner convey to his wife (*b*); and she may now, whether an infant or not, appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do (*c*).

Or when judicially separated.

When a wife has obtained a sentence of judicial separation from her husband, she is, as from the date of the sentence, and during the continuance of the separation, to be considered as a *feme sole* in respect of property of every description which she may acquire, or which may come to or devolve upon her; and, if cohabitation is resumed, all property to which she is then entitled is to be held to her separate use, subject only to any written agreement which she may have entered into with her husband, whilst living separate. If she dies intestate, her property devolves as if her husband were dead (*d*). A protection order, during its continuance, has the same effect in respect to the wife's power over property acquired by her since the desertion, as a decree of judicial separation (*e*).

Under the

By the Vendor and Purchaser Act, 1874 (*f*), when any

131, and *Lechmere* v. *Brotheridge*, 32 B. 353; see, too, *Hall* v. *Waterhouse*, 5 Giff. 64; and *Grigby* v. *Cox*, 1 V. sen. 518; Sug. Pow. 173; *Pride* v. *Bubb*, 7 Ch. 64; Lewin on Trusts, 759. So also it has been decided in Ireland, *Adams* v. *Gamble*, 12 Ir. Ch. R. 102. See also *post*, pp. 643 *et seq.*; 1120 *et seq.*

(*z*) *Troutbeck* v. *Boughey*, 2 Eq. 534.

(*a*) *Cooper* v. *Macdonald*, 7 Ch. D. 288; and see *Re Jakeman's Trusts*, 23 Ch. D. 344.

(*b*) Sect. 50.

(*c*) Sect. 40.

(*d*) 20 & 21 V. c. 85, s. 25; 21 & 22 V. c. 108, s. 6.

(*e*) 20 & 21 V. c. 85, s. 21; 41 V. c. 19, s. 4.

(*f*) 37 & 38 V. c. 78, s. 6; and see as to trust estates, *post*, p. 588.

V. and P. Act, 1874, and Married Women's Property Act, 1882, as to trust estates.

freehold or copyhold hereditament is vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a *feme sole*. And as to all trust estates devolving on her since the Married Women's Property Act, 1882, she is, it is conceived, in the same position as if she were a *feme sole*.

Case of invalid marriage.

The mere ceremony of marriage between a woman and a man with whom she is incompetent to contract marriage, of course leaves her merely a *feme sole*; and, as such, able to deal with her property as she thinks fit: but in such a case a purchaser from her, otherwise than by a deed in which her quasi-husband concurs, and acknowledged by her pursuant to the statute, would be entitled to strict proof of the facts creating the incompetency. Of course, if her marriage be dissolved, she is remitted to her original status of a *feme sole*.

Relief against fraudulent sale by married woman.

The observations already made (*g*) upon fraudulent sales by an infant, apply, it is conceived, to similar transactions by a married woman (*h*), but if the person dealing with her is aware that she is married, he cannot have the benefit of his contract, unless it is formally ratified in the only way in which by law a married woman is permitted to contract (*i*); so if he is aware of her incapacity to confer a good title, he may, it seems, lose his right to make her estate liable for the loss which he has sustained by her fraudulent act (*k*).

Married Women's Property Acts, 1870 and 1874.

The Married Women's Property Act, 1870, and the amending Act of 1874 (*l*), are repealed by the Married

(*g*) *Ante*, pp. 4, 5.

(*h*) See *Jones* v. *Kearney*, 1 D. & War. 134; *Savage* v. *Foster*, 9 Mod. 36; *Derbishire* v. *Home*, 3 D. M. & G. 80; *Blackie* v. *Clark*, 15 B. 603; *Vaughan* v. *Vanderstegen*, 2 Dr. 363, 408; *Liverpool Association* v. *Fairhurst*, 9 Ex. 422; *Barrow* v. *Barrow*, 4 K. & J. 409; *Sharpe* v. *Foy*, 4 Ch. 35; *Re Lush's Trusts*, *ib.* 591.

(*i*) *Nicholl* v. *Jones*, 3 Eq. 696, 709, 710; distinguish this case from *Savage* v. *Foster*, *suprà*.

(*k*) *Arnold* v. *Woodhams*, 16 Eq. 29.

(*l*) 33 & 34 V. c. 93, and 37 & 38 V. c. 50; as to which see p. 11 of the last edition of this work; and as to whether the words "rents and profits" in the 8th section of the Act of 1870 extend to the corpus, or only to the income, of her property, see *Re Voss, King* v. *Voss*, 13 Ch. D. 504.

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Women's Property Act, 1882 (*m*), except as to any act done, or right acquired, while either of such Acts was in force, or as to any right or liability of any husband or wife married before the 1st of January 1883 to sue or be sued under the provisions of those Acts for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability had accrued to or against such husband or wife before that date.

Effect of Married Women's Property Act, 1870.

The general effect of the Act of 1870 was to create a new separate property in specified kinds of personalty, and to provide that in certain cases the real property of a married woman should be held for her separate use, and also to confer upon her in respect of her statutory separate property a power to contract, similar to, but not more extensive than, that which she had previously possessed, in Equity, over property settled to her separate use. The Act also gave her certain legal remedies for the recovery and protection of her wages, earnings or other separate property, but did not otherwise alter her position. The policy of the Legislature was simply to secure for her benefit the separate property which the Act created, not to give her an independent status, or enlarge her contracting capacity (*n*).

Married Women's Property Act, 1882.

Under the Act of 1882 every woman married on or after the 1st of January, 1883 (and every woman married prior to that date as to property, whether real or personal, her title to which, whether vested or contingent, and whether in possession, reversion or remainder, has accrued after that date (*o*)), is entitled to hold and dispose of any real and personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee. Whether her property be real or personal, whether her estate or interest in it be legal or equitable, she is now

(*m*) 45 & 46 V. c. 75.

(*n*) *Howard* v. *Bank of England*, 19 Eq. 295, 301; *Ashworth* v. *Outram*, 5 Ch. D. 939.

(*o*) *Reid* v. *Reid*, 31 Ch. D. 402.

absolutely freed from the disability of coverture, subject only to this one restriction, viz., that a restraint on anticipation may be still attached to her enjoyment either of the corpus or the income of her property (*p*).

Traitors, felons, &c.

Or, lastly; The proposed vendor may have been guilty of treason, or murder, either as principal or accessory before the fact (*q*); and have thereby subjected his land to forfeiture, and escheat, upon his attainder (*r*), that is, upon sentence of death being passed upon him (*s*); or of any other felony punishable with death, attainder upon which involves forfeiture during life (*t*); or he may have incurred a præmunire (*u*): and in any of these cases, or at least in any of the first three, his conveyance, although *bonâ fide*, for valuable consideration, and to a purchaser without notice, was, prior to the 33 & 34 Vict. c. 23, subject to the inchoate rights of the Crown, or the lord of the fee (*x*). In these cases, however, that which we have, for convenience, referred to as an incapacity to sell was, in strictness, a mere want of title as against the Crown or lord of the fee. The effect of attainder was not avoided by a subsequent conditional free pardon in the penal colony (*y*); nor had a pardon under the sign manual the efficacy or legal effect of a pardon under the Great Seal (*z*); but property acquired by the convict's own industry, after an absolute or conditional remission of his sentence by the governor of the penal colony, was protected by statute against the claims of the Crown (*a*). Leaseholds of traitors and felons were, until the late Act, forfeited to the Crown upon conviction (*b*); but, of these, a *bonâ fide* sale between the crime and the conviction would, it seems, be

Effect of pardon.

(*p*) As to whether her personal status is altered by the Act, see *Symonds* v. *Hallett*, 24 Ch. D. 346.

(*q*) 54 Geo. III. c. 145; 9 Geo. IV. c. 31, s. 2.

(*r*) 3 Bac. Ab. 738.

(*s*) 4 Jarm. Conv. 74.

(*t*) 4 Bl. Com. 385; and 54 Geo. III. c. 145.

(*u*) 16 Ric. II. c. 5.

(*x*) See *Grosse* v. *Gayer*, Cro. Car. 172; 6 Bac. Ab. 383; 4 Jarm. Conv. 75.

(*y*) *Re Church*, 16 Jur. 517.

(*z*) *Bullock* v. *Dodds*, 2 B. & Ald. 258.

(*a*) 5 Geo. IV. c. 84, s. 26. *Gough* v. *Davis*, 2 K. & J. 623; which see as to the general effect of pardon.

(*b*) 4 Bl. Com. 387.

held good (*c*). A felon's share of money, which was impressed with the character of realty, would not, in the absence of anything to change its character, be treated as personalty so as to let in the Crown's claim by forfeiture (*d*). By the 33 & 34 Vict. c. 23, the forfeiture and escheat of lands and goods for treason and felony is abolished, but the Act does not affect the law of forfeiture consequent upon outlawry (*e*); a convict, *i. e.*, a person against whom, after the passing of the Act, judgment of death or of penal servitude shall have been pronounced or recorded by any Court of competent jurisdiction in England, Wales, or Ireland, upon any charge of treason or felony (*f*), is rendered incapable, while he remains subject to the operation of the Act, of alienating or charging any property, or of entering into any contract (*g*); but any property which he may acquire while lawfully at large, under any licence, is not subject to these disabilities (*h*). The Crown has power to appoint an administrator, in whom, upon his appointment, all the real and personal property of the convict is to vest (*i*); and he has an absolute power to let, mortgage, sell, convey, and transfer any part of such property as he thinks fit (*k*); and full directions are given as to the management of the convict's property, which, subject to the payments and allowances authorized by the Act, is to revert to the convict or his representatives on the completion of his sentence, or on his pardon or death (*l*). If no administrator is appointed, an interim curator may be appointed by a Court of Petty Sessions or by a Justice of the Peace, to administer and manage the property and affairs of the convict (*m*); his duties are analogous to those of a receiver of real and personal estate (*n*); he has, it would seem, no power to sell or mortgage real estate; nor can he sell or transfer

Forfeiture for felony now abolished.

(*c*) 4 Bl. Com. 388. See *Whitaker* v. *Wisbey*, 12 C. B. 44.

(*d*) *Re Harrop's Estate*, 3 Dr. 726; *Re Thompson's Trusts*, 22 B. 506.

(*e*) Sect. 1. See now 39 & 40 V. c. 18, which vests all property, falling to the Crown under a forfeiture, in the Treasury Solicitor. By 42 & 43 V. c. 59, outlawry in civil procedure has been abolished.

(*f*) Sect. 6.

(*g*) Sect. 8.

(*h*) Sect. 30.

(*i*) Sects. 9 and 10.

(*k*) Sect. 12.

(*l*) Sect. 18.

(*m*) Sect. 21.

(*n*) Sect. 24.

any personal estate, except with the authority of the Court or a Justice (*o*).

Bankrupts.

The incapacity of a bankrupt to make a title has no parallel in the case of a composition, the theory of which is a purchase of the assets by the debtor from his creditors (*p*), without any divesting of the estate by operation of law.

Incapacitated owners may sell under Lands C. C. Act, 1845.

And, with reference to incapacities to sell both of the 1st and of the 2nd description, we may here refer to the general consolidating Act of the 8 Vict. c. 18, which enables owners of partial estates and incapacitated owners (including tenants in tail precluded from alienation by Act of Parliament (*q*), and tenants for life with a restriction against alienation (*r*)) to sell land to the promoters of undertakings authorized by Acts in which the general Act is incorporated (*s*): and to the provisions of the Commons' Inclosure (*t*), and Land Tax Redemption (*u*) Acts, which empower such owners to effect sales for the purpose of meeting the expenses of inclosure, or of discharging their other settled estates from land tax; and to the provisions of the Acts authorizing leases and sales of settled estates under the direction of the Chancery Division (*x*); and to the provisions of the Acts authorizing the sale and exchange of the residences of the clergy, and of glebe lands in certain cases (*y*); and to the provisions of the

And under Inclosure and Land Tax Redemption Acts.

And under Leases and Sales, &c., Acts.

(*o*) Sect. 25. *Quære*, whether under his general powers of management he can let the real estate of the convict.

(*p*) *Ex p. Jones*, 10 Ch. 663, 665; *Re Kearley and Clayton's Contract*, 7 Ch. D. 615.

(*q*) *Ex p. Earl of Abergavenny*, 19 B. 153.

(*r*) *Devenish* v. *Brown*, 4 W. R. 783.

(*s*) See sects. 6, 7 *et seq.*

(*t*) 6 & 7 Will. IV. c. 115, ss. 46, 47; 8 & 9 V. c. 118; 9 & 10 V. c. 70. Acts for facilitating drainage, 9 & 10 V. c. 101; 10 & 11 V. c. 38; 12 & 13 V. c. 100; 13 & 14 V. c. 31; 19 & 20 V. c. 9. See also the Amendment Acts, 10 & 11 V. c. 111; 11 & 12 V. c. 99; 12 & 13 V. c. 83; 15 & 16 V. c. 79; 17 & 18 V. c. 97; 20 & 21 V. c. 31; 22 & 23 V. c. 43.

(*u*) 42 Geo. III. c. 116, ss. 14, 53, 98; 54 Geo. III. c. 70, s. 44, c. 173, ss. 6, 8, 12; 57 Geo. III. c. 100; 1 & 2 V. c. 58; 16 & 17 V. c. 71, s. 117. See *Braden* v. *King*, 9 Ha. 499.

(*x*) 40 & 41 V. c. 18, s. 50; 45 & 46 V. c. 38, as to which, *vide post*, Ch. XIX., sect. 1.

(*y*) 1 & 2 V. c. 23, s. 7 *et seq.*; 2 & 3 V. c. 49, s. 15 *et seq.*; 5 & 6 V. c. 54, s. 5; 9 & 10 V. c. 73, s. 22; and 23 & 24 V. c. 93, s. 41.

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And under Defence Acts.

And other Acts.

Improvement of Land Act, 1864 (z); and to the provisions of the Acts empowering the Secretary of State for War to acquire lands for the defence of the realm (a); and to the Acts authorizing the gift or sale by incapacitated owners of land as a site for schools (b), or for churchyards (c), or for sites for places of religious worship, &c. (d), and generally to the Acts incorporating the provisions of the Lands Clauses Consolidation Act.

Personal representative of trustee or mortgagee under Conv. Act, 1881.

We may here also refer to the alteration made in the law by sect. 30 of the Conveyancing Act, 1881, which provides that where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested, on any trust or by way of mortgage, in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to or become vested in his personal representatives or representative from time to time, in like manner (and with the same powers) as if the same were a chattel real vesting in them or him; and that for the purposes of the section the personal representatives for the time being of the deceased are to deemed in law his heirs and assigns within the meaning of all trusts and powers. This section, which applies only in cases of death on or after the 1st January, 1882, repeals sect. 4 of the Vendor and Purchaser Act, 1874, and sect. 48 of the Land Transfer Act, 1875, excepting in cases of death before that date (e).

(z) 27 & 28 V. c. 114; see, too, the Limited Owners' Residences Act, 1870 (33 & 34 V. c. 56), partially repealed and amended by 34 & 35 V. c. 84; 40 & 41 V. c. 31; and 45 & 46 V. c. 38.

(a) 5 & 6 V. c. 94; 18 & 19 V. c. 117; 23 & 24 V. c. 112; 27 & 28 V. c. 89; 36 & 37 V. c. 72.

(b) 4 & 5 V. c. 38; 12 & 13 V. c. 49.

(c) 30 & 31 V. c. 133.

(d) 36 & 37 V. c. 50.

(e) Where there is a valid contract for sale, and the title, though defective, has been accepted by the purchaser, it has been held that the vendor is not the less a trustee because he has his lien and right of possession until payment of the purchase-money. *Lysaght* v. *Edwards*, 2 Ch. D. 499. The section will, therefore, apply to such cases; and see *Re Spradbery's Mortgage*, 14 Ch. D. 514; *Re White's Mortgage*, 51 L. J. Ch. 856; *Re Brook's Mortgage*, 25 W. R. 841; *Christie* v. *Ovington*, 1 Ch. D. 279; and *Morgan* v. *The Swansea Urban Authority*, 9 Ch. D. 582. See also sect. 4 of the Conveyancing Act, 1881; and as to the distinction between this section and sect. 30, see *post*, p. 294.

Incapacity of charity trustees.

There is no positive law that property belonging to a charity shall be absolutely inalienable, but the onus is thrown on the alienee and those claiming under him of showing that the sale was beneficial to the charity (*f*); and, unless this can be done, the transaction will be set aside (*g*). There is naturally a strong presumption that land, once devoted to the charitable purpose, is intended for ever to remain inalienable; but under special circumstances the right to alienate it may be presumed. Thus where a sale of charity lands had taken place at a very distant date, and had always been acquiesced in, and the origin of the charity was lost in obscurity, it was held that a power in the trustees to sell might be presumed (*h*). The Chancery Division has power under its general jurisdiction, and also under Sir Samuel Romilly's Act (52 Geo. III. c. 101), to direct a sale of charity property, without the sanction of the Charity Commissioners (*i*); and, notwithstanding any of the disabling statutes, sales of charity lands may now be effected under 16 & 17 Vict. c. 137, s. 24 (*k*). Nor have the powers of the Charity Commissioners under this Act been abridged by the Allotments Extension Act, 1882 (*l*). So, where corporations or trustees in the United Kingdom, holding moneys in trust for any public or charitable purpose, have, under the 33 & 34 Vict. c. 34, invested their trust funds in any real security, and the equity of redemption of the premises comprised therein has become liable to foreclosure, or has been otherwise barred or released, the same are by the Act directed to be sold and converted into money. But without the express authority of Parliament or the Chancery Division, or unless they are acting under a scheme legally

(*f*) See *e. g. A.-G.* v. *Brettingham*, 3 B. 91.

(*g*) As to the alienation of charity lands by trustees, see *A.-G.* v. *Green*, 6 V. 452; *A.-G.* v. *Corp. of Newark*, 1 H. 395; *A.-G.* v. *Brettingham*, 3 B. 91; *A.-G.* v. *South Sea Co.*, 4 B. 453; *A.-G.* v. *Pargeter*, 6 B. 150; *A.-G.* v. *Pilgrim*, 2 M. & G. 414; *A.-G.* v. *Magdalen College*, 18 B. 223, and cases cited; *A.-G.* v. *Davey*, 4 D. & J. 136.

(*h*) *A.-G.* v. *Magdalen Col.*, 6 H. L. C. 189.

(*i*) *Re Ashton Charity*, 22 B. 288.

(*k*) And see 18 & 19 V. c. 124, s. 38.

(*l*) 45 & 46 V. c. 80; *Parish of Sutton* to *Church*, 26 Ch. D. 173.

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established, or with the approval of the Commissioners, charity trustees are now prohibited from selling or charging any portion of their charity lands (*m*). By a late Act (*n*), the trustees of any charity for religious, educational, literary, scientific, or public charitable purposes, upon obtaining from the Charity Commissioners a certificate of incorporation, may in their corporate name hold, acquire, convey, assign, or demise any present or future property belonging to their trust, but only in the same way and subject to the same restrictions as they might have done without such incorporation.

Of statutory corporations.

A statutory corporation is limited as to all its powers by the purposes of its incorporation, as defined by its memorandum of association or special Act (*o*); and, consequently, a railway company, having the usual powers under its special Act to take and use land for the purpose of the railway and works, cannot, whether for valuable consideration or otherwise, alienate for any purposes outside the Act any portion of its land, not being superfluous land within sect. 127 of the Lands Clauses Consolidation Act, 1845, or not being land taken for extraordinary purposes within sect. 45 of the Railways Clauses Consolidation Act, 1845; nor can it grant any easement over the same (*p*). How far such a corporation has, subject to the above principle, the rights of an ordinary owner, is a question which cannot be said to be as yet satisfactorily settled (*q*).

(*m*) 18 & 19 V. c. 124, s. 29. As to what accounts are directed in charity informations, see *A.-G.* v. *Drapers Co.*, 6 B. 382; *A.-G.* v. *Pretyman*, 4 B. 466; *A.-G.* v. *Hall*, 16 B. 388, *A.-G.* v. *Magdalen College*, 18 B. 223; *et vide* Seton, 550. As to what are charity lands, see *Governors for Relief, &c.* v. *Sutton*, 27 B. 651; *Royal Society* v. *Thompson*, 17 Ch. D. 407; *Finnis* to *Forbes*, 24 Ch. D. 587, 591.

(*n*) 35 & 36 V. c. 24.

(*o*) *Ashbury Carriage Co.* v. *Riche*, L. R. 7 H. L. 653; *Hawkes* v. *Eastern Counties R. Co.*, 5 H. L. C. 331.

(*p*) *Mulliner* v. *Midland R. Co.*, 11 Ch. D. 611. As to "superfluous land," see Ch. XIV. sect. 3. It would seem to follow that easements cannot be prescribed for against such a corporation, but the point, though raised, has never been satisfactorily decided, see *Mason* v. *Shrewsbury R. Co.* L. R. 6 Q. B. 578; *Norton* v. *L. & N. W. R. Co.*, 13 Ch. D. 268.

(*q*) See *Swindon Waterworks Co.* v. *Berks and Wilts Canal Co.*, L. R. 7 H. L. 697; *Norton* v. *L. & N. W. R. Co.*, *supra*; *Bonner* v. *G. W. R. Co*, 24 Ch. D. 1.

Of Common Law corporations.

The case of a Common Law corporation is, however, different. Such a corporation when duly created has, as an incident annexed by Law, the same power to purchase and alien real estate, and to enter into contracts respecting it, that is possessed and may be exercised by an individual; and even a clause in their charter restraining them from aliening or demising except in a certain form is deemed to be merely a precept, and not binding in law (*r*).

Of ecclesiastical corporations.

We may here also conveniently refer to the limited powers of alienation which, in respect of corporate property, have been conferred by the following statutes:—The 14 & 15 Vict. c. 104 authorizes ecclesiastical corporations, with the approval of the Church Estates Commissioners, to sell, enfranchise, and exchange church lands, or to purchase the interests of their lessees; and these powers, at first temporary, have been continued by later Acts (*s*). The 21 & 22 Vict. c. 44, and 23 & 24 Vict. c. 59, confer limited powers for the sale, enfranchisement, and exchange of lands on the universities of Oxford, Cambridge, and Durham, and their several colleges, and on the colleges of Eton and Winchester. Workhouses, lands, and other parish property may be sold under 5 & 6 Vict. c. 18 (*t*). We may also refer to the restrictions imposed by sects. 108-110 of the Municipal Corporations Act, 1882, on sales by municipal corporations (*u*); to the powers of alienation given by the Land Tax Redemption Acts; to the powers of sale conferred on the Governors of Queen Anne's Bounty by the 28 & 29 Vict. c. 69, s. 4; and to the powers of sale and leasing conferred on local authorities by the Public Health Act, 1875.

Of municipal corporations.

(*r*) *Sutton's Hospital Case*, 10 Co. 1; *Riche* v. *Ashbury Carriage Co.*, L. R. 9 Ex. 224, 262, 292.

(*s*) 17 & 18 V. c. 116, 21 & 22 V. c. 57; 22 & 23 V. c. 46; 23 & 24 V. c. 124, s. 28. The Land Tax Redemption Acts enable ecclesiastical corporations to sell lands for redemption of land tax. See *Whadborne* v. *Eccl. Commissioners*, 7 Ch. D. 375.

(*t*) Amended by 45 & 46 V. c. 58, s. 14; see too 20 & 21 V. c. 13. As to dispensing with enrolment, see 7 & 8 V. c. 101, s. 73, *Webster* v. *Southey*, 35 W. R. 622.

(*u*) 45 & 46 V. c. 50. See also s. 128, as to saving provisions, and on the old Act, Rawlinson's Mun. Corp. Act, 8th ed. 210. And see sect. 11 (2) of 48 & 49 V. c. 72.

(2.) *Who are relatively incompetent to sell.*

Who are relatively incompetent to sell.

Persons having no transferable interest.

Incapacities to sell of the second description may be considered to consist in, 1st, the want of a transferable (*x*) title to the property proposed to be dealt with; and, 2ndly, the existence of some relation between the proposed vendor and the purchaser which prevents a sale, except under special precautions; in which cases, however, the transaction is binding on the vendor and voidable by the purchaser.

Persons standing in special influential relation towards proposed purchaser.

Conditions in restraint of alienation:—how far valid.

Upon the first of these sub-divisions we may remark, that a right of alienation is generally incidental to and inseparable from the beneficial ownership of property. Thus a mere declaration annexed to a gift to A. in fee (*y*)—or, it is conceived, for any estate (*z*)—that the property shall not be aliened, or shall not be charged (*a*), is repugnant and void; the estate cannot be preserved to A. despite his own voluntary acts or involuntary misfortunes: but, within certain limits, which do not seem to be very clearly defined by the authorities (*b*), the estate limited to him may be made to determine or go over on the occurrence of any thing which, in case he were absolute owner, would operate as a voluntary or involuntary alienation. But though a man may, on alienation, qualify the interest of his alienee by a condition to take effect on bankruptcy, he cannot, by contract or otherwise, qualify his own interest by a condition to take effect

(*x*) See *A.-G.* v. *Corp. of Plymouth*, 9 B. 67; where a corporation was held incapable in Equity of contracting to sell property, by reason of a duty which it owed in respect thereof to the public. As to the remedy in cases of collusive alienations of corporate property, see 5 & 6 Will. IV. c. 76, s. 97, and *A.-G.* v. *Wilson*, 9 Si. 30.

(*y*) Co. Litt. 206 b, 223 a; 2 Jarm. 16.

(*z*) See as to an estate for life, *Rochford* v. *Hackman*, 9 Ha. 475; and see *Bird* v. *Johnson*, 18 Jur. 976.

(*a*) *Willis* v. *Hiscox*, 4 M. & Cr. 201; *Shaw* v. *Ford*, 7 Ch. D. 669; *Re Macleay*, 20 Eq. 186.

(*b*) See Co. Litt. 223 a; *Muschamp* v. *Bluet*, Bridg. 132; *Ware* v. *Cann*, 10 B. & C. 433; *Doe* v. *Pearson*, 6 Ea. 173; *Large's case*, 2 Leon. 82; 3 *ib.* 182; *Willis* v. *Hiscox*, *suprà*; *Attwater* v. *Attwater*, 18 B. 330; 2 Jarm. 18; see judgment of Sir G. Jessel in *Re Macleay*, 20 Eq. 186; but see *Ware* v. *Cann*, *suprà*; *Re Rosher*, 26 Ch. D. 801.

on his own bankruptcy. It seems, however, that he may do so by a condition to take effect on his own attempted alienation, although for value (c). Where the condition is in an active form, requiring something to be done by the grantee, and there is no collusive purpose, an act *in invitum*, such as bankruptcy, or the giving of a warrant of attorney, is not a cause of forfeiture (d). The case of a married woman furnishes an exception from the general rule: she, as we have already seen (e), may, in Equity, be effectually restrained while covert from dealing with even her fee simple estate: and no condition or gift over is necessary to give effect to the restriction; inasmuch as it operates to create in her a personal disqualification to contract or convey the particular property: the provision in such a case being one, not of forfeiture but of preservation; and even this disqualification may, as we have seen, be now, in special cases, removed by the Court.

We may here remark that the fact of a woman being a professed nun does not affect her capacity to take or dispose of property (f).

Undue influence.

Upon the 2nd sub-division we may instance the case of an agent for purchase, who cannot sell his own estate to his principal, without acquainting him with the facts (g): and, as a general rule, whenever such a relation subsists between contracting parties as may enable one to exercise undue influence (h) over the other, whether the relation be that of parent and child (i), guardian and ward, legal adviser and

(c) *Knight* v. *Browne*, 9 W. R. 515; *Brooke* v. *Pearson*, 27 B. 181.

(d) *Arson* v. *Holmes*, 1 J. & H. 530; and see cases cited in note, *ib.* p. 540.

(e) *Ante*, p. 10.

(f) *Re Metcalfe's Trusts*, 2 D. J. & S. 122.

(g) *Gillett* v. *Peppercorne*, 3 B. 78; *Rothschild* v. *Brookman*, 2 Dow & C. 188; *Bentley* v. *Craven*, 18 B. 75; *Blake* v. *Mowatt*, 21 B. 603.

(h) See *Gasborne* v. *Burdham*, 2 B. 76; *Cooke* v. *Lamotte*, 15 B. 234, 239; *Coulson* v. *Allison*, 2 D. F. & J. 521.

(i) *Hoghton* v. *Hoghton*, 15 B. 278; see *Bromland* v. *Bradley*, 2 S. & G. 339; *Wright* v. *Vanderplank*, 8 D. M. & G. 133; *Dimsdale* v. *Dimsdale*, 3 Dr. 556; *Gibson* v. *Jeyes*, 6 V. 266; *Holman* v. *Loynes*, 4 D. M. & G. 270; *Greeley* v. *Mousley*, 4 D. & J. 78, 94.

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client (*k*), trustee and *cestui que trust*, medical man and patient, spiritual adviser and penitent, or whatever else may be the nature of the confidential relation, if influence is acquired and abused, or confidence reposed and betrayed (*l*), the Court, upon proof of the exercise of such undue influence, will set aside the transaction (*m*); and the circumstance of the real facts not being stated on the face of the assurances will be considered *primâ facie* evidence of fraud (*n*).

Sect. 3.

(3.) *Who are generally incompetent to purchase.*

Who are generally incompetent to purchase.

Corporations cannot hold without licence.

Purchasers must, necessarily, be either individuals (*o*) or corporations: corporations, of whatever description, may purchase, but cannot, in their corporate capacities, hold land, except under a licence to hold in mortmain (*p*), or under the special provisions of an Act of Parliament (*q*).

(*k*) *Broun* v. *Kennedy*, 33 B. 133; 12 W. R. 360. As to the case of the promoter of a company, where a similar principle applies, see *Erlanger* v. *New Sombrero Phosphate Co.*, 3 Ap. Ca. 1284, *per* Lord Penzance.

(*l*) *Smith* v. *Kay*, 7 H. L. C. 750; *Harrison* v. *Guest*, 6 D. M. & G. 432; *Rhodes* v. *Bate*, 1 Ch. 252; *Tate* v. *Williamson*, 2 Ch. 56; *Mitchell* v. *Homfray*, 8 Q. B. D. 587; and see *Wright* v. *Proud*, 13 V. 136; and *Haygarth* v. *Wearing*, 12 Eq. 320; where the fiduciary relation was held not to be established, but the deed was set aside on other grounds; cf. *Cockburn* v. *Edwards*, 18 Ch. D. 449.

(*m*) In determining as to the validity of dealings with expectant heirs or reversioners, the question whether undue influence has been exercised or advantage taken, is always material.

(*n*) See *Mulhallen* v. *Marum*, 3 D. & War. 317; *Ahearne* v. *Hogan*, Dru. 310; *Gibson* v. *Russell*, 2 Y. & C. C. C 104; *Hatch* v. *Hatch*, 9 V. 292; *Huguenin* v. *Baseley*, 14 V. 273; 2 Wh. & T. L. C.; *Dent* v. *Bennett*, 4 M. & C. 269; *Harvey* v. *Mount*, 8 B. 439; *Billage* v. *Southee*, 9 Ha. 534; *Baker* v. *Loader*, 16 Eq. 49; and cases therein respectively cited; see too *Middleton* v. *Sherburne*, 4 Y. & C. 358.

(*o*) As to the effect of a conveyance to a body of unincorporated individuals, see *Thompson* v. *Shakspear*, 1 D. F. & J. 399; and *Carne* v. *Long*, 2 D. F. & J. 75. For the case of a fluctuating body, see *Gateward's Case*, 6 Co. 60, and *Goodman* v. *Mayor of Saltash*, 7 Ap. Ca. 633. In the case of a grant by the Crown to such a body, incorporation will be presumed, if necessary for establishing the validity of the grant. *Chilton* v. *Corp. of London*, 7 Ch. D. 735; *Lord Rivers* v. *Adams*, 3 Ex D. 361.

(*p*) Co. Litt. 2 b. A benefit building society under the 6 & 7 Will. IV. c. 32, might purchase real estate; *Mullock* v. *Jenkins*, 14 B. 628; but this Act, except as to subsisting societies, has been repealed by the 37 & 38 V. c. 42, which apparently restricts the power of such a society to hold land to what they hold by way of mortgage, or acquire by foreclosure. See as to charities, 16 & 17 V. c. 137, s. 27; 18 & 19 V. c. 124, ss. 35 and 41; and *ante*, p. 3.

(*q*) In *Perring* v. *Trail*, 18 Eq. 88,

Purchase by unincorporated class, bad.

Purchases by individuals, unincorporated, must be made by them in their private capacities and individual names: *e. g.* a purchase by, *eo nomine*, the inhabitants of a place, or the parishioners or churchwardens of a parish, is bad; so is a similar purchase by, or grant to, the commoners of a waste (*r*).

Parochial corporations may purchase and hold.

But, by custom, in London and elsewhere, the parson and churchwardens are a corporation to purchase and hold land (*s*); and so, by statute, are churchwardens and overseers generally in some matters relating to the Poor Laws (*t*), and to Education (*u*). So, too, certain quasi corporate bodies, as Local Boards of Health formerly established under the Public Health Act, 1848 (*v*), and Improvement Commissioners acting as Burial Boards (*y*), or the Sanitary Authorities under the Public Health Act, 1875 (*z*), to which these local jurisdictions are now transferred, may purchase and hold lands for the purposes authorized by their Acts. So, too, public companies formed under the Companies Act, 1862, may hold lands: but if formed for the promotion of art, science, religion, or charity, or any like object not involving the acquisition of gain, the quantity so held must not exceed two acres, unless the Board of Trade sanctions a larger holding (*a*). And the Governors of Queen Anne's Bounty have power to purchase (*b*).

So also local boards, &c.

Public companies.

Purchases for county purposes.

We may here also refer to the 21 & 22 Vict. c. 92, as amended by the 34 Vict. c. 14, under which contracts for the purchase of property for certain county purposes may be entered into in the name of the Clerk of the Peace on behalf

it was held that a statutory power conferred on a charity to acquire land by will, implied a power to devise land for the purposes of the charity. But see and distinguish *Lucheraft* v. *Prudham*, 6 Ch. D. 205.

(*r*) Co. Litt. 3 a.

(*s*) See *Warner's case*, Cro. Jac. 532; note (4) to Co. Litt. 3 a.

(*t*) 9 Geo. I. c. 7, s. 4; Sug. 685.

(*u*) Jointly with the minister; see 4 & 5 V. c. 38, ss. 7 and 8; 12 & 13 V. c. 49; and 14 V. c. 24.

(*v*) 11 & 12 V. c. 63.

(*y*) 20 & 21 V. c. 81; 23 & 24 V. c. 64. As to the metropolitan area, see 16 & 17 V. c. 134; 18 & 19 V. c. 128; 20 & 21 V. cc. 35, 81; 24 & 25 V. c. 101.

(*z*) 38 & 39 V. c. 55, ss. 7 and 175; see also the Act of 1872.

(*a*) 25 & 26 V. c. 89, ss. 18, 21.

(*b*) 1 & 2 V. c. 23; 28 & 29 V. c. 69.

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of the Justices, and the purchased property may be conveyed to the Clerk of the Peace, and will vest in his successors in the office from time to time.

Alien could not hold.

Previously to the passing of the Naturalization Act, 1870, an alien might purchase before denization; but the Crown might at any time assert its right to the property (*c*), unless the alien was a subject of a friendly state, and the property was taken for the purposes of his own residence or business for a term not exceeding twenty-one years (*d*); and the Crown might exercise the right of re-entry, without the necessity of any inquisition being taken, or office found (*e*). Before the Crown had exercised its right of re-entry, an alien might make a conveyance to a natural-born subject, which, though it could not defeat the prior right of the Crown, would be valid in every other respect (*f*). The Crown could, it was said, claim land vested in trustees for an alien (*g*); but not his share of the produce of sale of real estate, devised in trust to sell (*h*); nor, according to a modern decision, the benefit of an executory trust to convey land to an alien (*i*); but on appeal the grounds of the decision were not approved; and they were expressly dissented from in a later case (*k*).

Leases to, were formerly void.

The claim of the Crown extended to terms for years (*l*); and, until recently, the only exception was of leases of habitations of alien merchant friends during their lives and

(*c*) Co. Litt. 2 b; *Rex* v. *Holland*, Aleyn, 14; *Dumond* v. *Dumond*, 13 Ir. Eq. R. 93.

(*d*) 7 & 8 V. c. 66, s. 5, now rep. by 33 V. c. 14.

(*e*) 22 & 23 V. c. 21, s. 25.

(*f*) Shep. T. 232.

(*g*) *Du Hourmelin* v. *Sheldon*, 1 B. 90; Sug. 685; but see *Rittson* v. *Stordy*, 3 S. & G. 230; affirmed on other grounds, 2 Jur. N. S. 410, but expressly dissented from in *Barrow* v. *Wadkin*, 24 B. 1, where the prior cases are very fully reviewed; see, too, *Sharp* v. *St. Saveur*, 7 Ch. 343, where *Barrow* v. *Wadkin* is approved of.

(*h*) *Du Hourmelin* v. *Sheldon*, 1 M. & C. 525; and see p. 530, as to distinguishing *Fourdrin* v. *Goudey*, 3 M. & K. 383.

(*i*) *Rittson* v. *Stordy*, *supra*.

(*k*) *Barrow* v. *Wadkin*, 24 B. 1; *Sharp* v. *St. Saveur*, 7 Ch. 343.

(*l*) Co. Litt. 2 b; *Rex* v. *Eastbourne*, 4 Ea. 107.

residence within the realm (*m*). Leases, or agreements for a lease (*n*), to alien artificers or handicraftsmen, were, prior to the now repealed statute of 7 & 8 Vict. c. 66, absolutely void; although an assignment to an alien artificer of a subsisting lease has been held valid (*o*). By that Act, however, a resident alien friend might hold any lands, houses or other tenements, for the purpose of residence, or of occupation by himself or his servants, or for the purpose of any business, trade, or manufacture, for any term not exceeding twenty-one years, as if he were a natural-born subject (*p*).

Exception of certain leases under 7 & 8 V. c. 66.

But by the late Act (*q*) the disabilities of an alien as respects the acquisition of real and personal property were almost entirely removed; he may now acquire, hold, and dispose of real property situate within the United Kingdom as freely as a natural-born British subject; but until he has obtained a certificate of naturalization after the period of residence, and in the manner prescribed by the Act (*r*), he cannot hold office, or exercise any municipal, parliamentary, or other franchise. The Act is not retrospective (*s*); nor does it confer upon an alien any right to hold real property situate out of the United Kingdom (*t*).

Naturalization Act, 1870.

By the 7 Anne, c. 5, 4 Geo. II. c. 21, and 13 Geo. III. c. 21, the children of a male British-born subject, or of his son, are, with certain special exceptions (*u*), to be considered natural-born subjects; and, by the 7 & 8 Vict. c. 66, the child born of a British mother out of the Queen's allegiance is enabled to hold land (*x*); and by the 33 Vict. c. 14, where the father, or the mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such

Natural-born subject—who is.

(*m*) 32 Hen. VIII. c. 16, s. 13.

(*n*) *Lapierre* v. *M'Intosh*, 9 A. & E. 857.

(*o*) *Wootton* v. *Steffinoni*, 12 M. & W. 129.

(*p*) Sect. 5.

(*q*) 33 V. c. 14; amended as respects the taking of oaths of allegiance by 33 & 34 V. c. 102.

(*r*) Sect. 7 *et seq.*

(*s*) *Sharp* v. *St. Saveur*, 7 Ch. 343, and see sect. 2, sub-sect. 3.

(*t*) Sect. 2, sub-sect. 1.

(*u*) As to which, see the Acts, and *Fitch* v. *Weber*, 6 Ha. 51.

(*x*) Sect. 3.

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father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, is to be deemed a naturalized British subject (*y*); and by the 21 & 22 Vict. c. 93, s. 2, any person domiciled in England or Ireland, or claiming any real or personal estate in England, may, on petition to the Probate Division, obtain a binding declaratory decree of his right to be deemed a natural-born subject. Illegitimate children do not come within these provisions, although legitimatised according to a foreign law by the subsequent marriage of their reputed parents (*z*). The 33 Vict. c. 14, also contains provisions (*a*), under which naturalized or natural-born British subjects may divest themselves of their nationality, and become aliens.

Denization.

The right of the Crown to grant letters of denization is not affected by the Naturalization Act, 1870 (*b*); but the privileges which are incident to denization are less comprehensive than those which are now enjoyed by every alien, and there seems to be no reason why this prerogative of the Crown should be preserved. After denization, the alien can both purchase and beneficially hold land; but, as the letters patent have not a retrospective operation, the denizen cannot take by inheritance; nor are his issue born before denization capable of inheriting from him (*c*). The denizen is entitled to land purchased, before denization, if the Crown, before office found, has, by the letters patent of denization, confirmed his estate (*d*).

Naturalization.

Naturalization, for the purpose of holding land, could formerly be obtained only by a special Act of Parliament (*e*);

(*y*) Sect. 10, sub-sect. 5; see the preceding sections as to the re-admission to British nationality where the status has been lost, and generally as to the national status of women and children.

(*z*) *Shedden* v. *Patrick*, 1 Macq. 535; a case arising on the 4 Geo. II.

(*a*) Sects. 3 and 4.

(*b*) Sect. 13.

(*c*) See *Fish* v. *Klein*, 2 Mer. 431.

(*d*) *Fourdrin* v. *Gowdey*, 3 M. & K. 383.

(*e*) As to naturalization in the Colonies, see 10 & 11 V. c. 83; as to subjects of the United States, see 37 Geo. III. c. 97; *Doe* v. *Acklam*, 2 B. & C. 779; *Sutton* v. *Sutton*, 1 R. & M. 663.

but, by the 7 & 8 Vict. c. 66, a resident alien might obtain a certificate of naturalization, under which (so far as the possession and enjoyment of property are concerned, and subject to any special exceptions contained in the certificate) he acquired all the rights and capacities of a natural-born subject; and now, by the 33 Vict. c. 14, which is not retrospective (*f*), an alien who has resided in the United Kingdom, or has been in the service of the Crown, for not less than five years, and intends when naturalized either to reside in the United Kingdom or to serve under the Crown, may obtain from one of Her Majesty's principal Secretaries of State a certificate of naturalization; upon obtaining which, and taking the oath of allegiance required by the Act (*g*), the alien becomes entitled to all political and other rights, powers, and privileges, and subject to all the obligations of a natural-born British subject in the United Kingdom, except that, when within the limits of the foreign state of which he was previously a subject, he is not to be deemed a British subject, unless he has lost his former nationality; and an alien who has been naturalized under the 7 & 8 Vict. c. 66, may obtain a certificate of naturalization under the recent Act, as if he were not already naturalized. A married woman is to be deemed to be a subject of the state of which her husband is for the time being a subject, but a widow, being a natural-born British subject, who has become an alien by her marriage, is merely a statutory alien, and as such may be re-admitted to her British nationality in manner provided by the Act (*h*). It is conceived that in no case does naturalization affect the previously acquired title of the Crown.

Of female alien by marriage.

An infant can purchase; but on his attaining twenty-one, he may, at his option, adopt or abandon the contract (*i*): and should he, either having attained twenty-one, die without exercising or relinquishing such option, or die under that age,

Infant purchasing may elect, after majority.

(*f*) Sects. 7 *et seq.*; *Sharp* v. *St. Sauveur*, 7 Ch. 343; *De Geer* v. *Stone*, 22 Ch. D. 243.

(*g*) Sect. 9.

(*h*) See sect. 10. Compare sect. 16 of the 7 & 8 V. c. 66.

(*i*) *Ketsey's case*, Cro. Jac. 320; Co. Litt. 2 b.

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the like privilege descends on his representatives. The purchase of an annuity by an infant was made absolutely void by statute, and incapable of confirmation after majority (*k*); but this has been repealed by a later Act (*l*).

What time allowed for election.

No precise rule can be laid down as to the time within which the infant, after attaining majority, must elect. An unexplained acquiescence of three or four months (*m*), or, even a shorter period (*n*) in the case of a purchase, would probably amount to confirmation; but the delay of a fortnight would not be unreasonable (*o*). If his election be to avoid the purchase he ought to disclaim (*p*).

Infants' Relief Act.

The Infants' Relief Act, 1874, as already pointed out (*q*), applies to any ratification made after full age of any contract made during infancy, and precludes any action being brought upon such ratification. No distinction can, it is conceived, be drawn, as respects the application of the Act, between a contract for sale, one for purchase, and any other contract; and whenever a person, after attaining twenty-one, desires to adopt and make binding a contract which he has entered into while a minor, the only safe rule of practice is to have an entirely new contract, not one which is in terms, or according to its fair construction, merely a confirmation of the previous voidable contract.

Whether an infant, if he abandon the contract, can recover the price.

And, although the infant may abandon the contract, and thus relieve himself from all unsatisfied liabilities under it,

(*k*) 53 Geo. III. c. 141, s. 8.

(*l*) 17 & 18 V. c. 90. But see sect. 2 of the Infants' Relief Act, 1874 (37 & 38 V. c. 62).

(*m*) *Ketsey's case*, Cro. Jac. 320.

(*n*) See judgment in *Holmes* v. *Blogg*, 8 Taunt. 42, Park, J.; and *Birkenhead, &c. R. Co.* v. *Pilcher*, 5 Ex. 127.

(*o*) *Doe* v. *Smith*, 2 T. R. 436, 439.

(*p*) See 5 Ex. 128; *Goode* v. *Harrison*, 5 B. & Ald. 147. As to the adoption and avoidance of contracts to purchase land, see the notes to *Tucker* v. *Moreland*, 1 Amer. L. C. 314, 5th ed., and particularly *Henry* v. *Root*, 33 N. Y. 526. The rules laid down in the said cases are applicable to our law.

(*q*) *Vide ante*, p. 6, and cases there cited.

he cannot, it is said, recover money which he has actually paid, unless such payment were procured by fraud (*r*), or except in cases where he has derived no benefit from the contract (*s*); and if he be unable to restore the consideration, this will be an additional bar to the action: for instance, where an infant paid a premium for a lease of business premises, and entered upon and occupied them, it was held, upon his attaining majority and repudiating the lease, that, whatever might be the general rule, he could not, under the circumstances, recover the premium, inasmuch as he had enjoyed a part of that term, for which it formed the consideration (*t*): and although, upon the purchase of the fee simple the same decisive effect might not always be attributable to mere occupation (*u*), any act affecting the value of the estate, *e. g.*, the felling of ornamental timber (*x*), or the removal or alteration of buildings, &c., would, it is conceived, be conclusive against his right to reclaim the purchase-money.

Fraudulent purchase by, relieved, against in Equity; *semble.*

If, however, the infant had fraudulently represented himself to the vendor as an adult, Equity, it is conceived, would relieve the vendor by restraining any action for the purchase-money (supposing such action to be maintainable), and would allow the vendor to avail himself of any collateral securities which he might hold for the unpaid balance: but it could not enforce any security given by the purchaser personally during his infancy; such being absolutely void (*y*).

Purchase by lunatic, how far voidable.

A lunatic or idiot may purchase; and, according to the early authorities, cannot himself, though he recover his senses, avoid the transaction: but it may be set aside by the

(*r*) Macph. on Inf. 484; *Wilson* v. *Kearse*, 2 Pea. N. P. 196; *Ex p. Taylor*, 8 D. M. & G. 254; Simpson, 46.

(*s*) See as to avoidance by infants of their contracts, and their right to recover money paid thereunder, Lindley, 82.

(*t*) *Holmes* v. *Blogg*, 8 Taunt. 508; *Ex p. Taylor*, 8 D. M. & G. 254.

(*u*) See, however, *Blackburn* v. *Smith*, 2 Ex. 783.

(*x*) As to what is ornamental timber, see *Ford* v. *Tynte*, 2 D. J. & S. 127.

(*y*) Simpson, 97.

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Crown, after office found (*z*), or by his committee, after inquisition (*a*); or by his representatives, after his decease, unless he have recovered his senses and agreed to the purchase (*b*). The present doctrine of the Courts in regard to such purchases seems, however, to accord with that which has been already stated with respect to contracts for sale by lunatics (*c*). In a modern case, a purchase of an estate in consideration of the release of a bond debt, was set aside at the suit of a legatee of the bond debt (*d*).

Purchase by married woman, when voidable.

A married woman may purchase; and, by the contract for purchase, bind her separate property, even without referring to it (*e*); nor is there, apparently, any distinction between her statutory separate property under the recent Act and property settled to her separate use by a deed or will, as respects the liability to satisfy her engagements. But if, having no separate property, she enter into a contract for purchase, her husband, it is conceived, may annul the purchase and recover the purchase-money, unless she purchased as his agent (*f*); or she may herself annul it after her husband's death, although he may have agreed to it (*g*). In other words, "the extent of her separate property" is, it would seem, the limit of her contracting capacity.

Cases where a married woman is regarded as a *feme sole*.

Where the married woman is judicially separated from her husband (*h*), or has obtained a protection order under the Divorce Acts (*i*), or where her husband is a convicted felon, or an alien enemy, she is at law capable of entering into a binding contract for purchase (*k*).

(*z*) Co. Litt. 247 a.

(*a*) *A.-G.* v. *Parkhurst*, 1 Ch. Ca. 112.

(*b*) Co. Litt. 2 b.; 2 Bl. Com. 292; Shelf. on Lun. 347.

(*c*) *Ante*, pp. 6 *et seq.*

(*d*) *Steed* v. *Calley*, 1 Ke. 620; and see *S. C.*, *Ball* v. *Mannin*, 3 Bli. N.S. 1; cases cited *ante*, p. 7, n. (*h*); and *Waring* v. *Waring*, 6 Mo. P. C. 341, as to evidence of insanity.

(*e*) *Vide post*, pp. 1120 *et seq.*; Sug. 686.

(*f*) *Granby* v. *Allen*, 1 Raym. 224.

(*g*) Co. Litt. 3 a, 356 b; *Bamfather* v. *Jordan*, Doug. 452; Sug. 686.

(*h*) 20 & 21 V. c. 85, ss. 25, 26.

(*i*) 20 & 21 V. c. 85, s. 21; and 21 & 22 V. c. 108, ss. 6—10.

(*k*) See *Portland* v. *Prodgers*, 2 Vern. 104; and other cases cited, 2 Rop. H. & W. 120.

The general rules above referred to respecting acquiescence by an infant after majority will, it is conceived, apply to the case of a married woman retaining the estate, after the termination of the coverture; and, in the case of a purchase by a married woman representing herself to be single, or who, contracting as if single, has so dealt with the property as to prevent its perfect restoration *in specie*, Equity would, it is conceived, secure to the vendor all his legal rights, and would restrain the exercise of any adverse legal right by either the woman or her husband, supposing him to have been privy to the fraud.

May be confirmed by acquiescence.

Fraudulent purchase by, relieved against: *semble*.

Roman Catholics were formerly subject to disabilities in this respect which have now been removed by statute (*l*).

Roman Catholics.

Previously to the 33 & 34 Vict. c. 23, persons guilty of treason, or felony, or who had incurred a præmunire, might, before judgment, purchase land; but, upon judgment, it became subject to the rights of the Lord of the fee, or of the Crown: and purchases by such persons after judgment were subject to the same rules as purchases by aliens before denization (*m*). By the 33 & 34 Vict. c. 23, such persons, while continuing subject to the operation of the Act (*i. e.*, until bankruptcy, or completion of the sentence, or pardon, or death (*n*)), are incapacitated from entering into any contract (*o*), except, it would seem, in respect of property which they may acquire while lawfully at large under licence (*p*); but they are not otherwise prohibited from purchasing land. Upon the appointment, however, of an administrator, whose position and duties are not unlike those of a trustee in bankruptcy, all the property of the felon to which he was entitled at the time

Traitors, felons, &c.

(*l*) 10 Geo. IV. c. 7. As to the position of Roman Catholics with reference to land devoted to religious or charitable purposes, see 2 & 3 Will. IV. c. 115, and Anstey on Rom. Cath. p. 128 *et seq.* As to what are mere voluntary associations and not charitable institutions, see *Cocks* v. *Manners*, 12 Eq. 574.

(*m*) Co. Litt. 2 b; *Rex* v. *Haddenham*, 15 Ea. 163; Sug. 685.

(*n*) Sect. 7.

(*o*) Sect. 8.

(*p*) Sect. 30.

of the conviction, or to which he becomes afterwards entitled while subject to the operation of the Act, vests in the administrator (*q*); so that any purchase made by the felon after his conviction, and not falling within the exception contained in the Act, enures to the administrator for the purposes of the Act.

Bankrupts.

Under the 15th section of the Bankruptcy Act, 1869 (*r*), all property acquired by or devolving on the bankrupt *during the continuance* of the bankruptcy vested in the trustee; and by sect. 48, when the bankruptcy was closed, or at any time during its continuance, with the assent of creditors, the bankrupt might apply to the Court for an order of discharge, which, when granted, had the effect of releasing the debtor from all debts proveable under the bankruptcy, with certain specified exceptions (*s*). It was held in one case (*t*), that where a bankrupt had received his discharge, but his bankruptcy was not closed, the trustee might, under sect. 15, claim his after-acquired property; but in a later case (*u*), this decision was overruled by the Court of Appeal, and it was laid down that when a debtor has obtained his discharge, his after-acquired property belongs to him, and not to the trustee, although the bankruptcy or liquidation has not been formally closed. And, in like manner, after the close of a bankruptcy, property falling in to the bankrupt was held to belong to him and not to the trustee, although the bankrupt had not obtained an order of discharge (*x*). The effect of such an order is the same under the Act of 1883 (*y*) as under the Act of 1869; but the definition of property available for payment of debts, instead of comprising, as did the Act of 1869, property which may be acquired by or devolve on the debtor *during the continuance* of the bankruptcy, is now confined, so far as after-acquired property is concerned, to such as may be acquired by or devolve on the bankrupt *before his discharge* (*z*).

(*q*) Sect. 10.
(*r*) 32 & 33 V. c. 71.
(*s*) See sect. 49.
(*t*) *Re Bennet's Trusts*, 19 Eq. 245.
(*u*) *Ebbs* v. *Boulnois*, 10 Ch. 479.
(*x*) *Re Pettit's Estate*, 1 Ch. D. 478.
(*y*) 46 & 47 V. c. 52, see sect. 30.
(*z*) Sect. 44.

The question which was considered in the cases above referred to cannot now arise.

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(4.) *Who are relatively incompetent to purchase.*

The cases to be considered under this section may, it is conceived, be classified under two heads.

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Two classes of cases:

I. Where the authority of the vendor (*e. g.*, a mortgagee, or agent, or trustee for sale) does not, upon the true construction of the instrument under which he acts, authorize him to be himself the purchaser, a sale to himself, or to any one on his behalf, is voidable, at the instance of the person to whom he is accountable, on mere proof of the nature of the authority.

1st class, where the nature of the authority prevents purchase.

II. Where A. stands to B. in such a fiduciary, or even confidential, position that it is his duty to consider the interests of B. as paramount to his own, a sale by B. to A. is not in the strict sense voidable; but the burden is cast on A. to show that it was in all respects fair, and that no improper influence was exercised.

2nd class, arising from relation of parties.

The case of a mortgagee, who is incapacitated from selling to himself under his power, is a good illustration of the first principle; for it seems that a mortgagee selling is not in a fiduciary position towards his mortgagor (*a*), even where the mortgage is in the form of a trust for sale (*b*). His right is not to take over at a valuation, however fair, but to sell (*c*). On the other hand, the case of a solicitor who can maintain his purchase, if he can discharge the burden of proof thrown on him (*d*), or that of a mere trustee to preserve contingent remainders (*e*), illustrates the second principle. And it is

General illustration of the two classes.

(*a*) *Warner* v. *Jacob*, 20 Ch. D. 220.

(*b*) *Locking* v. *Parker*, 8 Ch. 30; *Re Alison*, 11 Ch. D. 284.

(*c*) *Martinson* v. *Clowes*, 21 Ch. D. 857.

(*d*) *Gibson* v. *Jeyes*, 6 V. 266; *Cane* v. *Lord Allen*, 2 Dow, 289; *Pisani* v. *A.-G. of Gibraltar*, L. R. 5 P. C. 516.

(*e*) *Parkes* v. *White*, 11 V. 209, 226.

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obvious that both elements of objection to the validity of a transaction which purports to be a sale and purchase may be simultaneously present.

The distinction stated by Lord Eldon.

The line of distinction between the two classes of cases, though it is not always clearly drawn, may be distinctly traced in the authorities. In *Ex parte Lacey* (*f*), Lord Eldon said: "The rule I take to be this: not that a trustee cannot buy from his *cestui que trust*, but that he shall not buy from himself. If a trustee will so deal with his *cestui que trust* that the amount of the transaction shakes off the obligation that attaches upon him as trustee, then he may buy. If that case (*g*) is rightly understood, it cannot lead to much mistake. The true interpretation of what is there reported does not break in upon the law as to trustees. The rule is this: a trustee, who is entrusted to sell and manage for others, undertakes, in the same moment in which he becomes a trustee, not to manage for the benefit and advantage of himself. It does not preclude a new contract with those who have entrusted him. It does not preclude him from bargaining that he will no longer act as a trustee. The *cestui que trust* may by a new contract dismiss him from that character. I disavow that interpretation of Lord Rosslyn's doctrine that the trustee must make advantage." And in a recent case (*h*), Jessel, M. R., referred the disability of a mortgagee to sell to himself simply to the reason of the analogous disability at law of a pledgee, who must sell at a fair price and cannot sell to himself.

Meaning of the rule as applied to 1st class.

It is submitted that the disability on the part of a trustee to sell either to himself or to his *cestui que trust* does not arise from the fiduciary position in which he stands (which would be ground for the application of the second rule only), but from the nature of his authority and the transaction, which must, therefore, in all cases be examined in deciding whether the disability is absolute.

(*f*) 6 V. 625.

(*g*) *Whichcote* v. *Lawrence*, 3 V. 740.

(*h*) *Nash* v. *Eads*, 25 Sol. J. 95.

Application to 1st class;

As a consequence of the first principle, the fact that no advantage has been made by the trustee, agent, or mortgagee is no answer to an impeachment of the transaction. "It may sometimes happen that the terms, on which a trustee has dealt, or attempted to deal, with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person:—they may even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted" (*i*).

to 2nd class.

But in cases belonging to the second class only, the fact that the terms were as good as could have been obtained becomes very material. It may be added that evidence of knowledge appears to be relevant only in so far as it is evidence of a dissolution or waiver of the relationship: and this is so, whether the case falls under the first or the second rule (*k*).

Tenant for life under Settled Land Act belongs to 1st class.

The first principle is probably the one to be applied in determining whether a tenant for life with a power of sale or leasing (*e.g.* under the Settled Land Act) can sell or lease to himself. The question would in this view be one of construction of his authority (*l*), and sect. 53 would seem to afford ground for a negative answer.

Cases falling within 1st class:

Other cases falling within the first class are the following:—

Trustees in bankruptcy.

A trustee, and formerly an assignee, of a bankrupt (*m*); and the rule precludes a purchase by his partner on behalf of the firm (*n*); or by anyone so related to the trustee as to stand

(*i*) *Aberdeen R. Co.* v. *Blaikie*, 1 Macq. 461.

(*k*) *Dunne* v. *English*, 18 Eq. 524; *Albion Co.* v. *Martin*, 1 Ch. D. 580; and see notes to *Fox* v. *Mackreth*, 1 Wh. & T. L. C.

(*l*) Cf. *Howard* v. *Ducane*, T. & R. 81; *Bevan* v. *Habgood*, 1 J. & H. 222.

(*m*) *Ex p. Lacey*, 6 V. 630 n.; *Ex p. Bennett*, 10 V. 395; *Ex p. Alexander*, 2 M. & A. 492; *Turner* v. *Trehawny*, 12 Sim. 49; *Pooley* v. *Quilter*, 2 De G. & J. 327.

(*n*) *Ex p. Burnell*, 7 Jur. 116.

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in a better position than an ordinary purchaser (*o*); the Court has, however, on the petition of a purchasing assignee, directed a reference to inquire whether the purchase would be for the benefit of the estate, he paying all the costs (*p*); and, on the report being favourable, has confirmed the sale (*q*); it has also, under special circumstances, allowed an assignee to be removed, at his own request, in order that he might bid at the sale of the bankrupt's estate (*r*); where, however, an assignee, who was also second mortgagee of the property, applied for leave to bid, (remaining assignee,) the Court refused the application; but allowed him to name a price at which he might take the property if not sold at the auction (*s*); and where a creditor's assignee, in another person's name, bought from a creditor, Vice-Chancellor Kindersley was of opinion that the validity of the sale depended on the vendor's believing that the purchase was made on behalf of the assignee, and directed an issue to determine the fact; but on appeal the transaction was declared wholly void, irrespectively of the vendor's belief (*t*):

Trustee for sale.

It is often said that though an ordinary trustee may purchase trust property from his *cestuis que trust*, a trustee for sale cannot do so (*u*); but it is conceived that the true meaning of the rule is, that a trustee for sale may not unite in himself the characters, and perform the functions, both of buyer and seller; or, in other words, purchase from himself, instead of from his *cestuis que trust* (*x*). When the purchase is from the *cestuis que trust*, and the sale is not conducted, either directly or indirectly by the trustee for sale, the transaction is taken out of the first class of cases (*y*):

(*o*) *Ex p. Forder*, W. N. 1881, p. 117, and see Yate-Lee, 471.

(*p*) *Ex p. Gore*, 3 M. D. & D. 77.

(*q*) *S. C.*, 7 Jur. 136.

(*r*) *Ex p. Perkes*, 3 M. D. & D. 385.

(*s*) *Ex p. Holyman*, 8 Jur. 156.

(*t*) *Pooley* v. *Quilter*, 2 D. & J. 327; see this case as to the duties of assignees in bankruptcy.

(*u*) *Denton* v. *Donner*, 23 B. 290; *Luff* v. *Lord*, 34 B. 220; and see *Franks* v. *Bollans*, 3 Ch. 717.

(*x*) *Ex p. Lacey*, 6 V. 625; *Luff* v. *Lord*, *suprâ*.

(*y*) *Post*, p. 48 *et seq.*

The committee of a lunatic's estate; the Court has even refused to confirm a lease to the committee, though approved by the Master as advantageous to the estate (*z*): Committee of lunatics.

A director of a company purchasing from the company (*a*): Director of a company.

A governor of a charity, taking a lease of the charity lands (*b*): Governor of charity.

A solicitor conducting a sale under order of the Court (*c*), or on behalf of trustees for sale, or of other persons whose duty it is to sell (*d*), and purchasing the estate himself: Solicitor to the party having conduct of sale.

A trustee whose duty it is to purchase particular property for his *cestui que trust* (*e. g.*, a trustee of renewable leaseholds bound, if possible, to renew), shall never buy it for himself; even though the proposed vendor positively refuse to part with it for the benefit of the *cestuis que trust* (*e*); but the purchase if effected will be considered as made on their behalf (*f*); and any additional interest which the trustee acquires by purchase will belong to his *cestui que trust* (*g*); subject, of course, to the trustee being re-paid the purchase-money (*h*): Trustees for purchase.

An agent for sale: except where the purchase is made with the knowledge and consent of his employer (*i*). Nor can he Agents.

(*z*) *Re Sir J. Smyth*, 29 July, 1829, reported in Shelf. on Lunacy, p. 416.

(*a*) *Aberdeen R. Co.* v. *Blaikie*, 1 Macq. 461.

(*b*) *A.-G.* v. *Lord Clarendon*, 17 V. 491.

(*c*) *Owen* v. *Foulkes*, 6 V. 630, n.; *Sidny* v. *Ranger*, 12 Si. 118.

(*d*) *Ex p. Bennett*, 10 V. 381; *Morse* v. *Royal*, 12 V. 372; *A.-G.* v. *Earl of Clarendon*, 17 V. 491, 500; and see *Downes* v. *Grazebrook*, 3 Mer. 200; *Whitcomb* v. *Minchin*, 5 Mad. 91; *Re Bloye's Trust*, 1 M. & G. 188, 495; *et post*, p. 42.

(*e*) *Ex p. Lacey*, 6 V. 630; *Ex p. Bennett*, 10 V. 395; see *Turner* v. *Trelawny*, 12 Si. 49; *Keech* v. *Sandford*, 1 Wh. & T. L. C., and cases there cited; *Re Lord Randolph's Will*, 26 Ch. D. 590; *Leigh* v. *Burnett*, 29 Ch. D. 231.

(*f*) See *Tanner* v. *Elworthy*, 4 B. 487.

(*g*) *Tosbrook* v. *Balguy*, 1 M. & K. 226; *Vaughton* v. *Noble*, 30 B. 34; where, however, the purchase was made out of trust moneys.

(*h*) And cf. *Fox* v. *Mackreth*, 1 Wh. & T. L. C., and cases there cited.

(*i*) *Charter* v. *Trevelyan*, 11 C. & F. 714, 732; *Sharman* v. *Brandt*, L. R. 6 Q. B. 720, 723; *Lunne* v. *English*,

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purchase from the person to whom he has sold, so long as the contract for sale is executory (*h*); and a re-purchase by him from the person to whom he has sold, even after the completion of his sale, will be regarded with extreme jealousy (*l*):

Auctioneers.

An auctioneer employed to sell the property (*m*):

Executors and administrators.

Executors and administrators, in respect to the personal estate of the deceased (*n*), and also in respect to his real estate, where they are selling in exercise of the implied or statutory power for payment of debts. So, too, the husband of an administratrix is incompetent to purchase from the co-administratrix (*o*):

Mortgagee: buying under power of sale:

A mortgagee with a power of sale, who cannot purchase, under the power, either in his own name or through an agent, or so arrange the transaction as to make himself the absolute owner (*p*): nor can his agent, who has acted in surveying the property and receiving the interest, purchase on his own account from the mortgagee (*q*): but the rule does not apply to a purchase of the equity of redemption by the mortgagee

18 Eq. 524; *De Busche* v. *Alt*, 8 Ch. D 286, *McPherson* v. *Watt*, 3 Ap. Ca. 254. The opinion of Lord Lyndhurst in the first case, that proof of adequacy of price might establish the sale is inconsistent with the principle of the authorities. And it is conceived that the consent of the employer is only material, as evidence that the principal authorises a purchase by his agent.

(*h*) *Parker* v. *McKenna*, 10 Ch. 96, 125.

(*l*) *Ibid.*

(*m*) *Oliver* v. *Court*, 8 Pr. 127, 160; Sug. 688; *Baskett* v. *Cafe*, 4 De G. & S. 388.

(*n*) *Killick* v. *Flexney*, 4 B. C. C. 161; *Watson* v. *Toone*, 6 Mad. 153; *Baker* v. *Read*, 18 B. 398; *Smedley* v. *Varley*, 23 B. 358. But see and distinguish *Clark* v. *Clark*, 9 Ap. Ca. 733, where the rule was held not to extend to a person, who, though nominated executor, had not proved the will.

(*o*) *Re Peperell*, 27 W. R. 410; but it is conceived that this would be otherwise in cases falling within the Married Women's Property Act, 1882.

(*p*) *Robertson* v. *Norris*, 1 Giff. 421, where redemption was decreed, though fifteen years had elapsed; see also *Downes* v. *Grazebrook*, *infrà*, and *Nat. Bank of Australasia* v. *United Hand-in-Hand Co.*, 4 Ap. Ca. 391.

(*q*) *Orme* v. *Wright*, 3 Jur. 19; *Re Bloye's Trust*, 1 M. & G. 488; and see *Downes* v. *Grazebrook*, 3 Mer. 200; *Robertson* v. *Norris*, *suprà*; *Martinson* v. *Clowes*, 21 Ch. D. 857.

from the mortgagor (*r*); the purchase being from its inception a transaction subsequent to the loan (*s*); but if from the influence of his position he purchases at an undervalue, the sale may be set aside (*t*); nor does the rule apply to a purchase by a second mortgagee from a first mortgagee selling under his power of sale (*u*), even though the second mortgage may be in the form of a trust for sale (*x*): and on such purchase, if unimpeachable on other grounds, the second mortgagee acquires an irredeemable title, just as if he were a stranger:

Mortgagee buying on a sale by the Court or in bankruptcy.

On a sale by the Court a mortgagee may, as a rule, obtain leave to bid, but not where he is also a trustee and the *cestuis que trust* object (*y*); and on a sale under the general order in bankruptcy, under the Act of 1849, it was usual, though not perhaps strictly necessary, for a mortgagee intending to bid to apply for leave to do so. The Act of 1861 (*z*) enabled any mortgagee, with the leave of the Court first obtained, to bid at any sale of the mortgaged property. There is no similar provision either in the Act of 1869 or in the recent Act; but, even without express enactment, the Court has always had power to grant leave to bid (*a*), and the law in this respect remains unaltered. If leave is given, the disability, so far as the particular sale is concerned, is entirely removed (*b*). In the case of a legal mortgage, it appears to have been a common, although improper, practice for the mortgagee to conduct the sale (*c*); in such a case, of course,

(*r*) *Webb* v. *Rorke*, 2 Sch. & L. 661, 673; and see *Waters* v. *Groom*, 11 C. & F. 684; *Knight* v. *Marjoribanks*, 2 M. & G. 10, and cases cited; *Dobson* v. *Land*, 8 Ha. 220, Sug. 689; *Gossip* v. *Wright*, 11 W. R. 632; *Melbourne Banking Co.* v. *Brougham*, 7 Ap. Ca. 307.

(*s*) *Post*, p. 282.

(*t*) *Ford* v. *Olden*, 3 Eq. 461.

(*u*) *Parkinson* v. *Hanbury*, 2 D. J. & S. 450; *Kirkwood* v. *Thompson*, 2 D. J. & S. 613; *Shaw* v. *Bunny*, 2 D. J. & S. 468.

(*x*) *Kirkwood* v. *Thompson*, *ubi supra*; *Locking* v. *Parker*, 8 Ch. 30; *Re Allison*, 11 Ch. D. 284.

(*y*) *Tennant* v. *Trenchard*, 4 Ch. 537.

(*z*) See sect. 132.

(*a*) *Ex p. Say*, 1 Dea. & Ch. 32; see Yate-Lee, 472.

(*b*) *Coaks* v. *Boswell*, 11 Ap. Ca. 232.

(*c*) See *Ex p. Cuddon*, 3 M. D. & D. 302.

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he could not purchase without the permission of the Court, which permission would not be given except upon very special grounds (*d*):

Solicitor of disqualified purchaser.

The solicitor or agent of a person disqualified from purchasing, would, it is conceived, in general, be unable to purchase on his own account (*e*):

Arbitrator.

An arbitrator contracting for unascertained claims of parties to the reference (*f*):

Bishop buying charge on rectory.

A bishop purchasing an annuity to be charged upon a rectory; he being the person whose consent was required to the sale; although he gave a better price than could be elsewhere obtained (*g*):

Inclosure or Land Commissioners.

Commissioners for Inclosure (now Land Commissioners (*h*)), under the General Inclosure Act, who cannot purchase any land in a parish in which an inclosure is made until five years from the date and execution of their award (*i*); and a similar disability for the term of seven years affects valuers acting under the Commons Inclosure Act (*k*):

Rector buying glebe.

A rector purchasing in the name of his curate a portion of glebe sold for the redemption of the land tax (*l*):

Tenant for life under Settled Land Act.

And, it is conceived, that a tenant for life selling under the Settled Land Act, who is placed in the position, and with the duties and liabilities, of a trustee for all parties entitled under the settlement (*m*), is absolutely disqualified, by reason

(*d*) See *Ex p. M'Gregor*, 4 De G. & S. 603; *Bellamy* v. *Cockle*, 18 Jur. 465.

(*e*) *Downes* v. *Grazebrook*, 3 Mer. 209; *Whitcomb* v. *Minchin*, 5 Mad. 91; *In re Bloye's Trust*, 1 M. & G. 488; *Hesse* v. *Briant*, 6 D. M. & G. 623; but see *Alvanley* v. *Kinnaird*, 2 M. & G. 1.

(*f*) *Blennerhasset* v. *Day*, 2 B. & B. 116.

(*g*) *Greenlaw* v. *King*, 3 B. 49.

(*h*) See sect. 46 of the Settled Land Act, 1882.

(*i*) 41 Geo. III. c. 109, s. 2.

(*k*) 8 & 9 V. c. 118, s. 129.

(*l*) *Grover* v. *Hugell*, 3 Russ. 428; but see *Beaden* v. *King*, 9 Ha. 429, 520.

(*m*) See sect. 53.

of the relation in which he stands to the settled property, from purchasing any portion thereof on his own account.

Incompetent purchaser bound at option of parties interested.

In all the above cases, the transaction is binding on the purchaser (*n*); and voidable merely at the option of the parties originally interested in the property, or their representatives (*o*).

Cases falling within 2nd class:—

The following are examples of cases falling within the second class, in which the sale is not voidable *ab initio*, but will be set aside unless the purchaser, on whom the burden is cast, proves that the transaction was in all respects fair, and that he obtained no undue advantage; or, in other words, that he treated the interests of the vendor with whom, or on whose behalf he was dealing, as paramount to his own:—

Guardian;

A guardian purchasing from his ward, immediately on his coming of age; although the price was adequate (*p*):

Agent for management;

An agent for management of property (*q*):

Receiver;

A receiver (*r*):

Steward taking a lease;

A steward contracting for a lease from his employer; to sustain which he must show the fairness of the transaction (*s*):

Counsel buying from client;

Counsel purchasing below their nominal value charges on his late client's estate (*t*), upon the validity of which he had advised:

(*n*) See *Sanderson* v. *Walker*, 13 V. 603.

(*o*) *Tate* v. *Williamson*, 1 Eq. 528; 2 Ch. 56.

(*p*) See Sug. 691; *Oldon* v. *Samborne*, 2 Atk. 15; *Mulhallen* v. *Marum*, 3 D. & War. 317; *Archer* v. *Hudson*, 7 B. 560; *Dawson* v. *Massey*, 1 B. & B. 219, 232.

(*q*) *Cane* v. *Lord Allen*, 2 Dow, 289; *Molony* v. *Kernan*, 2 D. & War. 31; *Chambers* v. *Betty*, Beat. 488; and see *Rossiter* v. *Walsh*, 4 D. & War. 485; *Murphy* v. *O'Shea*, 2 J. & L. 422.

(*r*) *Eyre* v. *McDonnell*, 15 Ir. Ch. R. 531; *Alcock* v. *Bond*, Fl. & K. 196.

(*s*) *Lord Selsey* v. *Rhoades*, 2 S. & S. 49; 1 Bli. N. S. 1.

(*t*) *Carter* v. *Palmer*, 8 Cl. & F. 657.

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Creditor of bankrupt;

A creditor of a bankrupt who has been consulted by the trustee as to the best mode of selling the estate (*u*).

Purchase not rendered valid by being by auction, &c.

A purchase coming within the above rules is not rendered valid by the fact of its having been by auction (*x*), or under a decree of the Court (*y*); or by the vendor having had independent professional advice (*z*): nor, when a person, by filling a confidential office, has acquired a knowledge of property, is his capacity to purchase it restored by his retirement from office (*a*); for his knowledge remains.

On the other hand:—

Execution creditor may buy.

An execution creditor may buy the property sold under the execution (*b*).

As to purchases by solicitors.

A solicitor is under no positive disability to purchase from his client (*c*); yet where the confidential relation subsists, and the transaction is impeached, he must be able to prove its fairness; and that either the circumstances were such as not to impose upon him the duty of advising the client, or that he gave the client all the information respecting the subject of the purchase which he himself possessed, and advised him as diligently as he would or ought to have done, had the transaction been between the client and a stranger (*d*); and that the sale was as advantageous to the client as it would have been if the solicitor had used his utmost endeavours to

(*u*) *Ex p. Hughes*, 6 V. 617.

(*x*) Sug. 691; *Ex p. James*, 8 V. 349; *Randall* v. *Errington*, 10 V. 423; *Ingle* v. *Richards*, 28 B. 361.

(*y*) *Price* v. *Byrn*, cited 5 V. 681; and see *Cary* v. *Cary*, 2 Sch. & L. 173.

(*z*) *Tate* v. *Williamson*, 2 Ch. 56.

(*a*) *Ex p. James*, 8 V. 352; *Carter* v. *Palmer*, 8 C. & F. 657; *Spring* v. *Pride*, 12 W. R. 892; but see as to agents, *Scott* v. *Dunbar*, 1 Moll. 442, *sed qu.* For this purpose he stands in the same relation to his client's trustee in bankruptcy as he did to his client, *Luddy's Trustee* v. *Beard*, 33 Ch. D. 500.

(*b*) *Stratford* v. *Twynam*, Jac. 418; *Ex p. Villars*, 9 Ch. 432.

(*c*) *Johnson* v. *Fesemeyer*, 3 D. & J. 13, 22; where the solicitor was an urgent creditor. See remarks of Lord Eldon, 2 Dow, 299; *Pisani* v. *A.-G. of Gibraltar*, L. R. 5 P. C. 516; *Davies* v. *London and Provincial Insurance Co.*, 8 Ch. D. 469.

(*d*) See *Holman* v. *Loynes*, 4 D M. & G. 270; *Barnard* v. *Hunter*, 5 W. R. 92.

sell the property to a stranger (*e*); but he need not have pointed out a merely speculative advantage (such as the possibility of an unplanned, though contemplated, railroad running near the property), which might be reasonably supposed to be equally in the knowledge of both parties (*f*): nor does the fact of the consideration having in part consisted of costs already incurred (*g*), or of a judgment vested in the solicitor (*h*), necessarily invalidate the transaction (*g*): although the mere fact of the client being indebted to the solicitor is an unfavourable feature in the case, on account of the additional influence which it must necessarily have created. So, too, the fact of the consideration being secured only by the solicitor's bond or covenant (*i*), or of the client being in embarrassed circumstances, and having no independent professional advice (*k*), are very material circumstances in judging of the validity of the transaction: and it has been held that a solicitor, taking a security from his client, must prove the actual advance of money by some other evidence than the instrument creating the security (*l*). And where the solicitor, who was himself the mortgagee, purchased the equity of redemption from his client, who had no separate legal advice, the conveyance was ordered to stand merely as a security for the money advanced, and the Court refused to import a power of sale into the transaction (*m*). So, where a solicitor acting on behalf of both parties prepared a lease to himself, and inserted an absolute covenant for title, although he knew or should have known that the title was defective, he was restrained by injunction from enforcing his cove-

(*e*) *Denton* v. *Donner*, 23 B. 285.

(*f*) See *Edwards* v. *Meyrick*, 2 Ha. 60, where the earlier cases are cited and reviewed, and *Holman* v. *Loynes*, 4 D. M. & G. 270; *Ward* v. *Hartpole*, 3 Bli. 470; *Bellamy* v. *Sabine*, 2 Ph. 425; *Salmon* v. *Cutts*, 4 De G. & S. 125; aff. 16 Jur. 623; *King* v. *Savery*, 1 S. & G. 271; *Savery* v. *King*, 5 H. L. C. 627; *Wright* v. *Vanderplank*, 2 K. & J. 1; *Cookson* v. *Lee*, 23 L. J. Ch. 173.

(*g*) *Edwards* v. *Meyrick*, *supra*, *aliter* as regards future costs. *Uppington* v. *Bullen*, 2 D. & War. 181.

(*h*) *Spencer* v. *Topham*, 22 B. 573.

(*i*) *Waters* v. *Thorn*, 22 B. 547.

(*k*) *Gresley* v. *Mousley*, 4 D. & J. 78.

(*l*) *Gresley* v. *Mousley*, 3 D. F. & J. 433.

(*m*) *Pearson* v. *Benson*, 28 B. 598.

nant (*l*). And where a solicitor and mortgagee took a conveyance of the equity of redemption from the mortgagor, a day labourer, who had no independent advice, the deed was set aside many years afterwards, because the burden of showing that all the circumstances had been explained to the mortgagor had not been discharged (*m*); and a solicitor will not be allowed, as against his client, to make a secret profit out of a transaction in which he is professionally concerned for him (*n*). But except in cases of undue influence resulting from other professional connections (*o*), the rule does not extend to prevent a purchase, by a solicitor, of his client's property in respect to which he has not been professionally employed (*p*); or to prevent his purchasing by auction his client's property if he have not acted for him professionally in respect to the sale (*q*). But when a solicitor has once advised upon an intended sale of his client's property, there is a difficulty in holding that any mere lapse of time can get rid of the fiduciary relation (*r*). The mere employment of another solicitor to peruse the draft conveyance on behalf of his client, no advice being afforded respecting the terms of the arrangement, will not be sufficient to validate the transaction (*s*); and where a purchase by a solicitor from his late client is defended on the ground that the client had other professional assistance, it must be shown that the solicitor, who intervened, was fully informed as to the state of the vendor's affairs, and the value of the property (*t*). A subsequent gift of the property to the attorney by the client will not validate a previous voidable sale to the attorney, unless it

(*l*) *Williams* v. *Moriarty*, 19 W.R. 818 (V.-C. of Ir.).

(*m*) *Prees* v. *Coke*, 6 Ch. 645.

(*n*) *Bank of London* v. *Tyrrell*, 10 H. L. C. 26.

(*o*) As to which see *McPherson* v. *Watt*, 3 Ap. Ca. 254, 263.

(*p*) *Jones* v. *Thomas*, 2 Y. & C. 520; *Edwards* v. *Meyrick*, 2 Ha. 68.

(*q*) *Austin* v. *Chambers*, 6 C. & F. 1; *Lawrance* v. *Galsworthy*, 3 Jur. N. S. 1049; *Coals* v. *Boswell*, 11 Ap. Ca. 232.

(*r*) See *Holman* v. *Loynes*, 4 D. M. & G. 270; *Gibbs* v. *Daniel*, 11 W. R. 653; *Lord Clanricarde* v. *Henning*, 9 W. R. 912; as to gifts, *Tomson* v. *Judge*, 3 Dr. 306.

(*s*) *King* v. *Savery*, 1 S. & G. 271, 311; *Savery* v. *King*, 5 H. L. C. 627.

(*t*) *Gibbs* v. *Daniel*, 11 W. R. 653.

is sufficiently clear that the client was aware of its voidability (*u*). Where the purchase is fair at the time when it is made, and the transaction is unimpeachable on other grounds, the mere circumstance of the solicitor having subsequently resold at a profit, is not material; and a trifling deficiency in value, such as may reasonably be considered an equivalent for immediate payment, and for the risk and expense of an ordinary sale, is not sufficient to invalidate the transaction (*x*).

Purchase by clerk of solicitor.

The rule which disqualifies a solicitor from purchasing from his client, pending the relation between them in the particular transaction, applies also to his clerk, who has been professionally concerned for the client (*y*).

Relation of disqualified purchaser.

The son or other relation of a trustee or other disqualified person, may purchase *bonâ fide* on his own account; and, although, when a trustee sells to a relation, the relationship is calculated to excite a suspicion, which, if confirmed by any other circumstance, it would require a very strong case to remove (*z*), the Court will, in the absence of fraud, even decree specific performance at the suit of the purchaser (*a*).

Tenant for life on sale by trustees with his consent.

A tenant for life, with powers of sale and leasing, has been held entitled to sell or lease to a trustee for himself (*b*), and this doctrine has been extended to the case of a mortgagor with power of leasing until entry by the mortgagee (*c*). So,

(*u*) *Waters* v. *Thorn*, 22 B. 547; where the gift was by will, and compare *Stump* v. *Gaby*, 2 D. M. & G. 623.

(*x*) *Spencer* v. *Topham*, 22 B. 573.

(*y*) *Hobday* v. *Peters*, 28 B. 349.

(*z*) See *Ferraby* v. *Hobson*, 2 Ph. 261; *John* v. *Jones*, 34 L. T. 570.

(*a*) Sug. 692; see *Coles* v. *Trecothick*, 9 V. 234.

(*b*) *Wilson* v. *Sewell*, 4 Burr. 1979; see too *Montague* v. *Cardigan*, Sug. Pow. 918; Farwell, Pow. 462. These cases are an exception to the general rule; and, it is conceived, the same principle does not apply to the case of a tenant for life exercising the powers conferred by the Settled Land Act; *vide ante*, p. 42.

(*c*) *Bevan* v. *Habgood*, 1 J. & H. 222. See now as to the statutory leasing powers of a mortgagor and a mortgagee in possession, sect. 18 of the Conveyancing Act, 1881.

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also, a tenant for life under a settlement, whose consent is requisite to the exercise of a power of sale by the trustees, may, nevertheless, purchase from them under the power (*d*): but this is an avowed exception from the general rule; and was so decided by Lord *Eldon*, on the ground of its being dangerous to unsettle the practice of conveyancers (*e*); but, although the power of consenting to or requesting a sale by the trustees may be regarded as given to the tenant for life, for his own benefit, and not as constituting any fiduciary relation, he is not, it would seem, in the same position as a stranger as regards the absence of obligation to communicate what he knows respecting the value of the property (*f*).

As to purchase by trustees.

A trustee may either simply, though expressly, hold the property in trust for others; or, although not nominally a trustee, he may yet owe duties to others in respect of it which invest him with a fiduciary character in the contemplation of the Court; or he may actually hold it in trust to effect a sale.

So his *cestui que trust* may be either *sui juris*, or the contrary,—as infants, married women, &c., &c.

Dry trustees may purchase.

The rule, in its absolute form, does not apply to mere dry trustees; *e.g.*, a trustee to preserve contingent remainders (*g*), or (it is conceived) a trustee to bar dower, or of a term for years assigned to attend the inheritance, or of a mere outstanding legal estate, or, in fact, a trustee of any description who cannot possibly derive in the transaction any advantage from his fiduciary character (*h*), and thus comes within the second class of cases. Where a purchase is made from *cestuis que trust*, and the sale is not conducted, either directly or

Trustees for sale not making the sale.

(*d*) *Howard* v. *Ducane*, T. & R. 81.

(*e*) T. & R. 86 and 87; *Grover* v. *Hugell*, 3 Russ. 432.

(*f*) *Dicconson* v. *Talbot*, 6 Ch. 32, 37, 38.

(*g*) *Parkes* v. *White*, 11 V. 226.

(*h*) *Naylor* v. *Winch*, 1 S. & S. 567.

indirectly, by the trustee for sale, the transaction may stand; but in every dealing between *cestuis que trust* and their trustee, the burden of proving the propriety of the transaction, and that no advantage was taken of the *cestuis que trust*, is thrown upon the trustee, and the relationship between them should, in respect at least of the subject-matter of the transaction, be actually, or virtually, dissolved.

Husband may buy of wife.

A husband might, even before the passing of the Conveyancing Act, 1881 (*i*), and the Married Women's Property Act, 1882, which have enlarged a wife's capacity, become a purchaser from his wife of property belonging to her (*k*).

Purchase by active trustees from *cestuis que trust*, when valid.

Nor is a trustee or agent incapable of purchasing from his *cestuis que trust* or employers, &c., if they be *sui juris* (*l*); but, in any such case, the Court looks at the transaction with a jealous eye (*m*); and the question to be determined is, not whether the price is fair, but whether the purchaser, having held a confidential situation, previously to the purchase, has at the time of the purchase, shaken off that character, by the consent of the other parties, freely given, after full information, and has bargained for the right to purchase (*n*).

Sale in fact by *cestui que trust*.

So, where the sale by auction is in fact conducted by the *cestui que trust*, a purchase at an adequate price by the trustee for sale, may be supported (*o*), if, in effect, the *cestui que trust* has so acted in relation to the taking of the estate by the

(*i*) Sect. 50.

(*k*) *Hewson* v. *Negus*, 16 B. 598; 22 L. J. Ch. 655; *Teasdale* v. *Braithwaite*, 5 Ch. D. 630, *Re Foster and Lister*, 6 Ch. D. 87.

(*l*) See *Coles* v. *Trecothick*, 9 V. 244; *Randall* v. *Errington*, 10 V. 426.

(*m*) *Davidson* v. *Gardner*, Sug. 691; see *Murphy* v. *O'Shea*, 2 J. & L. 422, 429; *Ploughright* v. *Lambert*, 52 L. T. 646.

(*n*) See *Ex p. James*, 8 V. 353; *Denton* v. *Donner*, 23 B. 290; and see *Huddy* v. *Huddy*, 2 Ch. D. 190; *Ploughright* v. *Lambert*, *supra*.

(*o*) See *Coles* v. *Trecothick*, 9 V. 234, and compare *Hugh* v. *Richards*, 28 B. 361.

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trustee in lieu of the price paid by him for it as to render it inequitable to dispute the validity of the transaction.

Purchase by creditors' trustee, with consent of majority, invalid, *semble*.

In the case of a trust for the benefit of creditors, it is doubtful whether the consent of the majority will bind the minority, so as to render valid a purchase by the trustee for sale (*p*).

Solicitor cannot consent for *cestui que trust*.

The solicitor of a *cestui que trust* has no general authority to authorize a purchase by the trustee (*q*).

Resignation of trust immaterial.

A trustee cannot get rid of his incapacity by resigning the trust or confidential situation; for he would still retain the knowledge he had acquired while in office (*r*).

Secret purchase.

And the circumstance of a trustee or agent purchasing secretly in the name of a third person is indicative of fraud; and the sale will, as a general rule, on that ground be set aside (*s*).

Purchase under decree.

Where the *cestuis que trust* or any of them are not *sui juris*, a purchase by a trustee, who comes within the restrictive rule, can be safely effected only under an order of the Court; which order will not be made unless to the evident advantage of the trust (*t*). A purchase by a trustee, made without this precaution, cannot be supported even by evidence of the best possible terms having been secured for the *cestuis que trust* (*u*).

Risk incurred by disquali-

We may next consider the nature of the risk incurred by

(*p*) See Lord Eldon's remarks, *Ex p. Lacey*, 6 V. 628, and see 630, n. (*b*); *Ex p. Beaumont*, 1 M. & A. 304; *Ex p. Thwaites*, *ib.* 323; and Sug. 692, but see also *Ex p. Bage*, 4 Mad. 459.

(*q*) *Downes* v. *Grazebrook*, 3 Mer. 209.

(*r*) *Ex p. James*, 8 V. 352; and see *Carter* v. *Palmer*, 8 C. & F. 657.

(*s*) *Lord Hardwicke* v. *Vernon*, 4 V. 411; *Lewis* v. *Hillman*, 3 H. L. C. 607, 630; *Ingle* v. *Richards*, 28 B. 361; *Dunne* v. *English*, 18 Eq. 535; *McPherson* v. *Watt*, 3 Ap. Ca. 254.

(*t*) See *Campbell* v. *Walker*, 5 V. 681; *Farmer* v. *Dean*, 32 B. 327.

(*u*) *Aberdeen R. Co.* v. *Blaikie*, 1 Macq. 472.

the trustee or other person purchasing while under any incapacity of the second description.

fied purchaser.

He may, on the requisition of any of his *cestuis que trust*—including in this general term all persons interested in the estate before the sale (*x*) and their representatives—be compelled,

He may be forced to reconvey;

1st, To reconvey the estate, supposing he have not resold it (*y*):

or let estate be resold;

Or, 2ndly, To let it be put up for sale, and to reconvey to another purchaser, if a better can be found; but if not, to keep it (*z*):

or to account for profit if he has sold.

Or, 3rdly, If he have resold it at a profit, to account for such profit (*a*):

Sub-purchaser with notice is similarly liable.

And a sub-purchaser or mortgagee, buying or lending with notice of the circumstances creating the incapacity in the original purchaser, is in the same predicament, if the original sale be impeached (*b*); although it has been suggested that, if the case be merely that of an avowed purchase by a trustee from his *cestuis que trust*, a sub-purchaser or mortgagee would not be liable unless he had notice of circumstances rendering it voidable in Equity (*c*). In many doubtful cases, his security would practically depend upon his having the legal estate.

Terms upon which recon-

In the first of the above cases, the purchaser will be credited

(*x*) See *Ex p. Morgan*, 12 V. 6.

(*y*) *Ex p. Lacon*, 6 V. 627; and see *Hamilton* v. *Wright*, 9 C. & F. 123.

(*z*) *Ex p. Reynolds*, 5 V. 707; *Ex p. Hughes*, 6 V. 617; *Randall* v. *Errington*, 10 V. 128.

(*a*) *Fox* v. *Mackreth*, 2 Br. C. C. 400, and cases cited in last note, the rule is the same although, as in the case of shares, stock, &c., similar property can be purchased; see *Brookman* v. *Rothschild*, 3 Sw. 153; *Rothschild* v. *Brookman*, 2 Dow & C. 188. But where an agent for purchase has sold his own property to his principal, the latter's only remedy is probably rescission; *Re Cape Breton Co.*, 29 Ch. D. 795.

(*b*) *Cookson* v. *Lee*, 23 L. J. 473, Ch.

(*c*) See Sug. 695.

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veyance is decreed: Accounts:

with his original purchase-money and interest at £4 *per cent.*, and all sums expended by him in substantial improvements (unless he have been guilty of actual fraud) (*d*), as, in one case, buildings erected, and inclosures made (*e*), or in repairs (*f*); and interest from the time of the advances; and will be debited with rents received by him, an occupation rent for any part occupied by himself (*g*), and his receipts for the sale of timber, &c., with interest; and also with the estimated amount of deteriorations (if any) (*h*).

In making the above estimates, buildings pulled down will, if incapable of repair, be valued as old materials, but otherwise as buildings standing (*i*).

If nothing be due to him, he must, of course, give up his purchase without receiving any further consideration (*k*).

Must reconvey at once unless decree gives him a lien for balance due.

Must produce deeds.

Where the decree directs a reconveyance, and an account, and payment of the balance to the purchaser, but does not in terms give him a lien for such balance upon the estate, the reconveyance must be made at once, without waiting for the accounts (*l*). And a solicitor purchasing from his clients, who were trustees for sale, has been compelled to produce the title deeds before payment, although he alleged that the early title was defective, and on that ground resisted the exposure (*m*).

Terms of resale.

The estate, if put up for resale, will be put up at the amount due to the purchaser, ascertained as just mentioned (*n*), and, if there be no advance, he must keep the

(*d*) *Baugh* v. *Price*, 1 Wils. 320; see *Howell* v. *Howell*, 2 M. & C. 478; and *Turner* v. *Trelawny*, 12 Si. 49.

(*e*) *York Buildings Co.* v. *Mackenzie*, 8 Bro. P. C. 56, 71.

(*f*) *Ex p. Hughes*, 6 V. 617. Necessary repairs are allowed for, even in cases of fraud; 1 Wils. 322.

(*g*) *Ex p. James*, 8 V. 351.

(*h*) *Ex p. Bennett*, 10 V. see p. 401.

(*i*) *Robinson* v. *Ridley*, 6 Mad. 2.

(*k*) *Greenlaw* v. *King*, 3 B. 63.

(*l*) *Trevelyan* v. *Charter*, 9 B. 140.

(*m*) *Shallcross* v. *Weaver*, 12 B. 272.

(*n*) *Ex p. Hughes*, 6 V. 617.

estate: in one case, where permanent improvements had been made, it was put up at its improved value, subject to the question whether he should be allowed the amount of such improvements (*o*).

Estate not re-allotted.

In the case of a resale, the *cestuis que trust* cannot, if the estate were bought in one lot, insist on its being put up in several lots (*p*), nor, it is conceived, allotted otherwise than as it was bought; to effect the change they must take it off the purchaser's hands on the terms we have already mentioned (*q*).

Purchaser must account for the balance due from him.

The third rule would extend to a purchaser who, by sale of wood, minerals, &c., had more than repaid himself his purchase-money, expenses, and interest (*r*); or who had made a similar profit by merely letting the property (which in the case of unexpected public improvements might often easily happen in the course of a few years, although the original price were perfectly fair); it is apprehended that, in either of these cases, he would have, not only to reconvey, but also to pay the balance found due from him (*s*).

Variations in funds on payment into Court.

If, in any of the above cases, the purchaser has paid purchase-money into Court, and it has been invested, he will neither gain nor suffer by a rise or fall in the funds (*t*).

If *cestuis que trust* decline, trustee may take the benefit of the purchase.

Of course, if the *cestuis que trust*, on being made cognisant of the facts, decline to adopt the purchase, the trustee may retain the benefit of it, however advantageous it may be (*u*).

Costs.

And, as a general rule, a trustee, though free from fraud, must pay the costs of a suit occasioned by his improper

(*o*) *Williamson* v. *Seaber*, 3 Y. & C. 717.

(*p*) *Ex p. James*, 8 V. 351.

(*q*) *Ante*, p. 51.

(*r*) *York Buildings Co.* v. *Mackenzie*, 8 Br. P. C. see p. 71.

(*s*) *S. C.*; and see *Ex p. Hughes*, 6 V. 622, and the decree in *Nesom* v. *Clarkson*, 2 Ha. 176; 4 Ha. 97.

(*t*) *Ex p. James*, *suprà*.

(*u*) *Barwell* v. *Barwell*, 34 B. 371.

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dealing with the estate (*x*); such is the almost invariable practice where the *cestuis que trust* are infants (*y*); in other cases, however, the rule is sometimes relaxed where the trustee is free from all moral blame (*z*); and in one instance it would seem that he was even allowed to receive a sum on account of costs (*a*).

Time allowed for impeaching sale.

Mere lapse of time, except where it is a statutory or positive bar to relief, is only evidence of acquiescence (*b*); but a *cestui que trust* wishing to impeach a sale must do so within a reasonable time (*c*); which, as a matter of fact, is generally less than the time allowed by the Statute of Limitations (*d*); though independently of statutory limitation, no positive limit of time can be imposed, and each case must be governed by its own circumstances (*e*). A delay of eighteen years has been held to be an implied confirmation of the transaction (*f*); ten and eleven years have been held insufficient in the case of an individual (*g*); and twelve in the case of creditors (*h*); but the general tendency of modern decisions and of recent legislation is more and more to discourage stale demands; and where there are other circumstances, showing acquiescence, beyond the mere lapse of time, a short delay will be a sufficient bar to relief (*i*). A longer time, however, is allowed to a class of persons, *e. g.* creditors, than would be allowed to an individual (*k*).

Classes more favoured than individuals.

(*x*) Sug. 695; *Plowright* v. *Lambert*, 52 L. T. 646.

(*y*) *Sanderson* v. *Walker*, 13 V. 601.

(*z*) *Baker* v. *Carter*, 1 Y. & C. 250.

(*a*) See *Downes* v. *Grazebrook*, 3 Mer. 209.

(*b*) *Life Association of Scotland* v. *Siddal*, 3 D. F. & J. 58. As to what is acquiescence, see *Redgrave* v. *Hurd*, 20 Ch. D. 1; *De Busscke* v. *Alt*, 8 Ch. D. 286, 312 *et seq.*

(*c*) *Chalmer* v. *Bradley*, 1 J. & W. 59; *Lord Selsey* v. *Rhoades*, 1 Bli. N. S. 1; *Beaden* v. *King*, 9 Ha. 532; *Baker* v. *Read*, 18 B. 398; aff. 3 W. R. 118.

(*d*) See *Morse* v. *Royal*, 12 V. 374.

(*e*) Per L. J. Turner in *Gresley* v. *Mousley*, 4 D. & J. 95; see *Redgrave* v. *Hurd*, 20 Ch. D. 1.

(*f*) *Gregory* v. *Gregory*, G. Coop. 201; Jac. 631; *Champion* v. *Rigby*, 1 R. & M. 539; *Harcourt* v. *White*, 28 B. 303; *Burwell* v. *Burwell*, 34 B. 375; set, too, *Seagram* v. *Knight*, 3 Eq. 398; varied on app. 2 Ch. 628.

(*g*) *Hall* v. *Noyes*, cited 3 V. 748; *Murphy* v. *O'Shea*, 2 J. & L. 422.

(*h*) *Anon.*, cited 6 V. 632.

(*i*) *Wright* v. *Vanderplank*, 7 D. M. & G. 597; *Harston* v. *Tenison*, 20 Ch. D. 109, per Fry, J., 117.

(*k*) *Whichcote* v. *Lawrence*, 3 V. 740; *York Buildings Co.* v. *Mackenzie*, 8 Br. P. C. 42.

From what period time begins to run.

And time will not run against a *cestui que trust* until he be *sui juris* (*l*), and aware that the trustee was improperly the purchaser (*m*): nor will it, in general, run against him, so long as his interest is contingent, or reversionary (*n*), or (in particular) dependent on the will of the purchasing trustee, or of a party implicated in the breach of trust (*o*): for in the former case he has no adequate motive for incurring the expense of attempting to impeach the sale, and in the latter he is under a direct inducement not to do so: but, though he is not bound to assert his title until it comes into possession, the mere circumstance of his interest being reversionary does not make him incapable of assenting to a breach of trust (*p*); and though the rule is, that the onus lies on the party relying on acquiescence to prove the facts from which the consent of the *cestui que trust* is to be inferred, yet there may well be cases in which, from great lapse of time, such facts ought to be presumed (*q*).

It does not appear that his poverty is in itself an excuse for *laches* (*r*): although it would, probably, have an effect upon the Court if united with other circumstances (*s*).

Confirmation of voidable purchase.

A *cestui que trust* may confirm a voidable purchase by his trustee, &c.; but, to make his confirmation binding, he must be *sui juris* (*t*), fully aware of the material facts (*u*), of his

(*l*) Lewin, 496; *Campbell* v. *Walker*, 5 V. 678, 682.

(*m*) *Chalmer* v. *Bradley*, 1 J. & W. 51; *Charter* v. *Trevelyan*, 11 C. & F. 714.

(*n*) *Gowland* v. *De Faria*, 17 V. 20; *Duke of Leeds* v. *Lord Amherst*, 2 Ph. 117; *Browne* v. *Cross*, 14 B. 105; *Hope* v. *Liddell*, 21 B. 183; *Life Association of Scotland* v. *Siddal*, 3 D. F. & J. 58.

(*o*) *Roberts* v. *Tunstall*, 4 Ha. 257.

(*p*) *Life Association of Scotland* v. *Siddal*, *suprà*; and see remarks of L. J. Turner on judgment in *Browne* v. *Cross*, *ubi suprà*.

(*q*) Per Lord Campbell in *Life Association of Scotland* v. *Siddal*, *suprà*.

(*r*) *S. C.*; *Roberts* v. *Tunstall*, *ubi suprà*.

(*s*) *Gregory* v. *Gregory*, G. Coop. 201; and see *Oliver* v. *Court*, 8 Pri. 168.

(*t*) *Campbell* v. *Walker*, 5 V. 678, 682.

(*u*) *Chalmer* v. *Bradley*, 1 J. & W. 51; *Wedderburn* v. *Wedderburn*, 4 M. & C. 41; *Skottowe* v. *Williams*, 3 D. F. & J. 545.

right to impeach the transaction (*y*), and of the legal consequences of his confirming it (*z*): he must be under no undue influence, the confirmation must be a solemn and deliberate act (*a*), free from any pressure resulting from the original transaction (*b*), and, in the case of a plurality of *cestuis que trust*, it must, to be effectual, be the act of all (*c*), as a majority cannot bind the minority; not even in the case of a public company, in respect to matters not so provided for by the deed of settlement (*d*).

A married woman may bind herself by acquiescence as regards her separate estate.

A married woman may, as regards her separate property, not subject to any restraint against anticipation, bind herself by acquiescence, just as if she were a *feme sole* (*e*); but whether she can do so when she is restrained from anticipation, appears to have been questioned. In one case (*f*), in which, however, it was not necessary to decide the point, L. J. Turner doubted whether the restraint against alienation would protect a married woman against the rules of the Court as to lapse of time and acquiescence; and after remarking that the fetter was imposed for her protection against her husband, and that it prevented her from disposing of her interest, stated that he was not prepared to say that it exonerated her from the obligation of asserting, within a reasonable

(*y*) *Cann* v. *Cann*, 1 P. Wms. 727; *Roche* v. *O'Brien*, 1 B. & B. 330, 340; *Marker* v. *Marker*, 9 Ha. 16.

(*z*) *Cockerell* v. *Cholmeley*, 1 R. & M. 425, *Murray* v. *Palmer*, 2 Sch. & L. 486.

(*a*) *Carpenter* v. *Harvot*, 1 Ed. 338; see *De Montmorency* v. *Devereux*, 7 Cl. & F. 188; *Salmon* v. *Cutts*, 4 De G. & S. 125; aff. 16 Jur. 623; *Great Luxemburg R. Co.* v. *Magnay*, 25 B. 586; where pending a suit impeaching the purchase by the trustee, the *cestuis que trust* sold the property.

(*b*) *Crowe* v. *Ballard*, 3 Br. C. C. 117; *Wood* v. *Downes*, 18 V. 128; *Wiseman* v. *Beake*, 2 Vern. 121; *Scott* v. *Davis*, 4 M. & C. 92.

(*c*) *Ex p. Lacey*, 6 V. 628; *Tommey* v. *White*, 3 H. L. C. 49.

(*d*) *Clay* v. *Rufford*, 5 De G. & S. 768.

(*e*) *Jones* v. *Higgins*, 2 Eq. 538; the dicta of the M. R. in *Davies* v. *Hodgson*, 25 B. 187, if meaning more than this, viz, that a married woman cannot impeach for her own benefit her own fraudulent act, are not reconcileable with the later authorities.

(*f*) *Derbishire* v. *Home*, 3 D. M. & G. 80, 113; but see *Davies* v. *Hodgson*, *suprà*; *Clive* v. *Carew*, 1 J. & H. 205.

time, any claim which she might be entitled to advance; but a married woman who is restrained from alienation is not merely protected against the acts of her husband, but is also generally precluded from disposing of her separate estate during the coverture; and to hold that she is capable of acquiescing in a breach of trust, which may lessen or prejudice her estate, seems inconsistent with the scope and working of the restraint on alienation. In one case (*g*), the protection afforded by this restraint has been carried so far as to exempt the separate estate still in the hands of the trustees from liability to replace other separate estate comprised in the same settlement, and which the married woman had fraudulently disposed of. This question does not seem to be affected by the Married Women's Property Act, 1882.

Power to dispense with the restraint under 33 & 34 Vict. c. 93.

But, in a case falling within the Married Women's Property Act, 1870 (*h*), the Court removed the restraint against alienation, so as to make the separate property of a married woman available for her antenuptial debts (*i*).

Acquiescence and confirmation distinguished.

We may lastly here remark, that conduct, or language, on the part of a *cestui que trust* who is *sui juris*, and which, had it occurred upon, or previously to, the commission of the breach of trust, might have amounted to acquiescence, and have precluded him from all right of complaint, may, if it occur subsequently to the breach of trust, be wholly insufficient to confirm the transaction, or to release the trustee from liability (*k*).

(*g*) *Clive* v. *Carew*, 1 J. & H. 205; and see *Stanley* v. *Stanley*, 7 Ch. D. 589.

(*h*) 33 & 34 V. c. 93, s. 12.

(*i*) *Sanger* v. *Sanger*, 11 Eq. 470, *London and Provincial Bank* v. *Bogle*, 7 Ch. D. 773; *Re Hedgeley*, 34 Ch D. 379; and see now sect. 19 of the Married Women's Property Act, 1882, and *vide ante*, p. 10.

(*k*) *Munch* v. *Cockerell*, 5 M. & C. 218; and see *Duke of Leeds* v. *Earl of Amherst*, 2 Ph. 123, and *Phillipson* v. *Gatty*, 7 Ha. 516; *Life Association of Scotland* v. *Siddal*, 3 D. F. & J. 58; *De Busche* v. *Alt*, 8 Ch. D. 312 *et seq.*

Chapter II.

CHAPTER II.

AS TO SALES AND PURCHASES BY FIDUCIARY VENDORS AND PURCHASERS.

1. *As to the time for sale.*
2. *The manner of sale.*
3. *The consideration.*
4. *General points relating to sales by fiduciary vendors.*
5. *As to purchases by fiduciary purchasers.*

Sales by fiduciary vendors.

UNDER the term, fiduciary vendors, we may comprise agents for sale, trustees in bankruptcy, mortgagees with powers of sale, tenants for life selling in exercise of the statutory power conferred by the Settled Land Act, persons selling under the special authority of Railway and other Acts of Parliament, and, in particular, of the Lands Clauses Consolidation Act, 1845 (and who may be conveniently described by the general appellation of statutory owners (*a*)), and, lastly, trustees selling in pursuance of either an express trust or only a permissive power;—the term, trustees, being also held to include executors, when selling freeholds or copyholds in exercise of a power expressed or implied, and personal representatives generally, when selling the chattels real of their testator or intestate.

(*a*) As to the meaning of the word "owner" in the 76th section of the L. C. C. Act, see *Douglas* v. *L. & N. W. R. Co.*, 3 K. & J. 173; and under sect. 79, see *Ex p. Winder*, 6 Ch. D. 696. A person in possession, but showing a bad title, is not, but a surviving partner selling the property in the discharge of his duty to wind up the partnership is, an owner within that section; see *Ex p. Freemen of Sunderland*, 1 Dr. 184.

Time, consideration for, and manner of.

We may consider sales by such vendors, with reference to the proper time for and manner of sale, and to the price which should be obtained; and then refer to some points which cannot conveniently be classed under any of these heads.

Section 1.

Time for sale.

(1.) *The time for sale.*

By agents.

An agent for sale should, subject to a reasonable exercise of discretion, sell with all convenient speed.

Assignees, bankrupts, and trustees in bankruptcy.

It was the duty of assignees of a bankrupt, and is equally the duty of trustees in bankruptcy, to sell without any unnecessary delay (*b*); and any single creditor might insist on a sale; and, if he so insisted, it was doubtful whether the Court could refuse its assent (*c*).

Mortgagees.

Their power to sell under the Conveyancing Act, 1881.

A mortgagee, with a general power of sale, may sell without waiting for the concurrence of the mortgagor; nor does a stipulation in the mortgage deed that the mortgagor shall, if required, join in any sale, entitle a purchaser to require his concurrence (*d*). By the combined effects of the Conveyancing Act, 1881 (*e*), and the Settled Land Act (*f*), Lord Cranworth's Act (*g*) is repealed, and its provisions in regard to the powers of mortgagees are re-enacted with additions. By the Conveyancing Act, 1881 (*h*), it is provided that a mortgagee, where the mortgage is made by deed, shall, by virtue of the Act, have power, when the mortgage money has become due, *inter alia* to sell, or concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title or evidence of title or other matter, as the mortgagee thinks fit, with power to vary any contract

(*b*) *Ex p. Goring*, 1 V. 169; and see *post*, p. 75.

(*c*) *S. C.*; and see *Ex p. Hughes*, 6 V. 622; *Ex p. Miller*, 1 M. D. & D. 44.

(*d*) *Corder* v. *Morgan*, 18 V. 344.

(*e*) Sect. 71.

(*f*) Sect. 64.

(*g*) 23 & 24 V. c. 145.

(*h*) Sect. 19.

for sale, and to buy in at an auction, or to rescind any contract for sale, and resell without being answerable for any loss occasioned thereby. But this power is not to be exercised (*i*), unless and until (*k*) notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money or of part thereof for three months after such service, or (*l*) some interest under the mortgage is in arrear and unpaid for two months after becoming due, or (*m*) there has been a breach of some provision contained in the mortgage deed or in the Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon. But the title of the purchaser is not to be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; and the remedy of the person damnified by the sale is to be in damages against the person improperly exercising the power (*n*). These new statutory powers which are more favourable to the mortgagee than the powers ordinarily inserted in mortgage deeds, and which, unlike the powers conferred by Lord Cranworth's Act, extend not only to real, but also to personal, property, will be extensively relied on in practice; they may, however, be excluded or modified, and they apply only to mortgage deeds executed after the 31st December, 1881 (*o*).

Mortgagees power of sale, how not extinguished.

When a mortgagor and mortgagee with a power of sale concurred in demising to a trustee, for the purpose of granting building leases at the request of the mortgagee, during the continuance of the security, and of the mortgagor when the debt was satisfied, and the demise was not expressly made subject to the power of sale, it was held that the power of

(*i*) Sect. 20.
(*k*) Sub-sect. 1.
(*l*) Sub-sect. 2.
(*m*) Sub-sect. 3.
(*n*) Sect. 21, sub-sect. 3.
(*o*) Sect. 19, sub-sects. 3, 4.

sale was not extinguished, and that the concurrence of the mortgagor was not necessary to make a good title (*p*). Where a mortgagee with a power of sale submortgages with a declaration that the submortgagee may exercise the power, it has been doubted whether the power of sale in the original mortgagee is not destroyed by the transfer (*q*). The better opinion seems to be that it is only suspended, and upon a simple transfer by way of submortgage, is exercisable by the transferee.

Statutory owners.

Statutory owners must, of course, sell within such limits (if any) as to time as are prescribed by the Act under which they derive their powers. The Lands C. C. Act, 1845, seems to impose no restriction as to time upon the purchase of lands by agreement; although it limits the time for compulsory purchases by the company to a period of three years from the passing of the special Act, unless some other period be therein prescribed (*r*); and it would seem that, in the absence of restriction, even a compulsory power could be exercised without reference to lapse of time (*s*): but a railway company, having found their original undertaking impracticable cannot, it seems, exercise their compulsory powers in respect only of part of the proposed scheme (*t*). It is sufficient if the company, within the limited period, give notice of their intention to take the lands, and summon a jury to assess their value (*u*); or merely give notice (*v*) and take possession,

Statutory notice.

(*p*) *King* v. *Heenan*, 3 D. M. & G. 890.

(*q*) *Chase* v. *Nowell*, 25 L. J. Ch. 709.

(*r*) L. C. C. Act, 1845, s. 123.

(*s*) *Thickness* v. *Lancaster Canal Co.*, 4 M. & W. 472. A railway company cannot, it seems, exercise its compulsory powers when it is evident that the entire line cannot be completed; see *Gray* v. *Liverpool and Bury R. Co.*, 9 B. 391; *Cohen* v. *Wilkinson*, 1 M. & G. 481; and see generally on the subject, *Tiverton R. Co.* v. *Loosemore*, 9 Ap. Ca. 480.

(*t*) *Gray* v. *Liverpool and Bury R. Co.*, *Cohen* v. *Wilkinson*, *supra*.

(*u*) *Brocklebank* v. *Whitehaven R. Co.*, 15 Si. 632; and see *Reg.* v. *Birmingham R. Co.*, 15 Q. B. 647; *Worsley* v. *South Devon R. Co.*, 16 Q. B. 539; *Burkinshaw* v. *Birmingham, &c. R. Co.*, 5 Ex. 187.

(*v*) The publication of the requisition required by the Artizans and Labourers' Dwellings Act, 1875, is analogous to the notice to treat; *Wilkins* v. *The Mayor of Birmingham*, 25 Ch. D. 78.

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in which latter case it rests with the landowner to have the value ascertained (*x*); or give notice and deliver the usual bond (*y*), or even merely give notice (*z*); but if, after giving notice, they neglect to take the necessary steps for summoning a jury, the issue of the warrant to the sheriff may be enforced against them by a mandamus under the C. L. Procedure Act, 1854 (*a*). A contract in anticipation of the special Act, which subsequently confers the power of sale, is binding on the company (*b*); but it has been held that the company, after incorporation, are not bound by the agreement of the promoters with the landowner, unless they expressly, or by acts, adopt it as their own (*c*).

Trustees for sale.

Trustees for sale are not, by the usual direction to sell "with all convenient speed," precluded from exercising a reasonable discretion as to the time of sale; nor need one co-trustee adopt the opinion of another (*d*); but in cases of clearly improper delay they will be responsible for any consequential loss to the estate (*e*). A direction to sell with all reasonable expedition, and within a specified time, does not preclude a sale after the expiration of such period, or inca-

(*x*) *Doe* v. *N. S. R. Co.*, 16 Q. B. 526; *Doe* v. *Leeds R. Co.*, 16 Q. B. 796; *Inge* v. *B. W. & S. V. R. Co.*, 3 D. M. & G. 658.

(*y*) *Sparrow* v. *O. W. & W. R. Co.*, 2 D. M. & G. 91.

(*z*) *Lord Salisbury* v. *G. N. R. Co.*, 17 Q. B. 840; *Edinburgh R. Co.* v. *Leven*, 1 Macq. 281.

(*a*) *Fotherby* v. *Metrop. R. Co.*, L. R. 2 C. P. 188. See now as to the mode of procedure, R. S. C. 1883, O. 53, r. 1, and *post*, p. 1101.

(*b*) *Hawkes* v. *E. C. R. Co.*, 5 H. L. C. 331. In the *Manchester, &c. R. Co.* v. *G. N. R. Co.*, 9 Ha. 284, a question arose, but was not decided, as to the effect of two special Acts conferring on different companies the right of compulsorily purchasing the same land.

(*c*) *Preston* v. *Liverpool R. Co.*, 5 H. L. C. 605. See, too, *Williams* v. *St. George's Harbour Co.*, 24 B. 339; reversed on app., but on the ground that the company had adopted the contract; 2 D. & J. 547. See also as to the power of the projectors to bind the company, *Cal. R. Co.* v. *Mayor of Helensburgh*, 2 Macq. 391; and as to the personal liability of those who profess to contract for the company, see *Kelner* v. *Baxter*, L. R. 2 C. P. 174, *Scott* v. *Lord Ebury*, *ib.* 255; *Melhado* v. *Porto Allegre, &c. R. Co.*, L. R. 9 C. P. 503; *Re Empress Engineering Co.*, 16 Ch. D. 125.

(*d*) *Marsden* v. *Kent*, 5 Ch. D. 598, following *Buxton* v. *Buxton*, 1 M. & C. 80.

(*e*) *Pattenden* v. *Hobson*, 22 L. J. Ch. 697, *Cuff* v. *Hall*, 1 Jur. N. S. 972; *Devaynes* v. *Robinson*, 24 B. 86; *Fry* v. *Fry*, 27 B. 144.

pacitate the trustees from making a good title to a purchaser; but as between themselves and their *cestuis que trust* (*f*) the onus of showing that the *cestuis que trust* are not prejudiced by the time for sale being extended, is thrown upon the trustees, unless the Court relieves them of the trust, or authorizes the delay (*g*); and where a sale has been postponed until long after the time at which it apparently ought to have been effected, a prudent purchaser should ask for some explanation of the delay (*h*). For the purpose of determining the relative rights of tenants for life and remaindermen, twelve months will be considered a reasonable period within which to execute a trust to sell or purchase "with all convenient speed" (*i*) or, "so soon as conveniently may be" (*k*); and this although the property be a reversion (*l*). Where trustees are directed to sell "with all convenient speed," or "so soon as conveniently may be," but the time for sale is left entirely to their own discretion, they may not arbitrarily postpone the sale for an indefinite period; especially in cases where such postponement may have the effect of varying the relative rights of tenants for life and remaindermen (*m*); and in one case (*n*) where trustees, having a discretion, allowed a reversionary interest in a fund to remain unsold for nineteen years, when it fell into possession, the tenant for life, who had received nothing,

(*f*) *Pearce* v. *Gardner*, 10 Ha. 287; *Cuff* v. *Hall*, 1 Jur. N. S. 972. In *De la Salle* v. *Moorat*, 11 Eq. 8, where the trust was to sell, but not within five years, unless a certain price could be obtained, an administration order was made under 15 & 16 Vic. c. 86, s. 47, on the ground that the trustees could give good receipts for the purchase-money.

(*g*) *Cuff* v. *Hall*, 1 Jur. N. S. 972.

(*h*) *Stroughill* v. *Anstey*, 1 D. M. & G. 635; and see judgment in *Devaynes* v. *Robinson*, *supra*.

(*i*) *Parry* v. *Warrington*, 6 Mad. 155; *Vickers* v. *Scott*, 3 M. & K. 500; and cases cited in *Elwin* v. *Elwin*, 8 V. 547.

(*k*) *Greisley* v. *Lord Chesterfield*, 13 B. 288; but see cases cited in *Elwin* v. *Elwin*, 8 V. 547.

(*l*) *Wilkinson* v. *Duncan*, 23 B. 471.

(*m*) *Walker* v. *Shore*, 19 V. 391.

(*n*) *Wilkinson* v. *Duncan*, 23 B. 469; in this case it was considered that the trustees had properly exercised their discretion, but that it was not to prejudice the tenant for life. And see *Brown* v. *Gillatly*, 2 Ch. 751; *Wright* v. *Lambert*, 6 Ch. D. 649.

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was held entitled to be recouped, out of the fund, the difference between the amount when it fell into possession and the value of the reversion at the end of a year from the testator's death, calculated on the assumption, that it would fall into possession on the day when it actually did fall in.

Whether bound to sell immediately.

It has been said that, in the absence of any special direction, trustees for sale should, subject to a reasonable exercise of discretion, sell with all convenient speed (*o*): but in practice, trustees of a will or settlement are not generally considered bound under the ordinary trust for sale, nor is it usual for them, to sell, except upon the request of some one or more of their *cestuis que trust*, or under circumstances which render a sale necessary or expedient (*p*); or unless the property is not of a permanent character. And as respects the time of sale, greater latitude may, it is conceived, be allowed where the trust for sale is contained in a settlement, than where it is conferred by a will; for in the former case, the trust is frequently introduced merely for the convenience of declaring the beneficial trusts, and not with any intention of an immediate or early sale of the property. The like distinction may also be held to exist between the case of a trust (whether in a deed or will) to sell for the purpose of raising a specified sum, and that of a trust to sell for the mere purpose of a division of the proceeds among a class of beneficiaries. After an action is commenced for the administration of the trust, trustees cannot sell without leave of the Court (*q*): it has, however, been held by the Court of Queen's Bench, that the power of an *executor* to make a good title to the chattels real of the testator is not affected by the existence of an administration

(*o*) Sug 62; *Davison* v *Tennison*, 11 Ch. D. 341

(*p*) If, after request, the trustees unreasonably delay the sale, this will not affect the relative rights of the *cestuis que trust*; see *Lechmere* v. *Earl of Carlisle*, 3 P. W. 215, *Walker* v. *Shore*, 19 V. 391, *Caldecott* v. *Caldecott*, 6 Jur. 232; *Gresley* v. *Lord Chesterfield*, 13 B. 294.

(*q*) *Walker* v. *Smalwood*, Amb. 676.

suit, so long as there is no decree (*r*); and it would seem that in a creditor's suit an executor may, with leave of the Court, exercise the power of sale which is implied from a charge of debts (*s*).

Executors selling under implied power of sale.

Greater latitude as to the time for selling is given to executors who sell under a power of sale implied from a charge of debts, than would be allowed to ordinary trustees for sale; and though it is only right that a purchaser should be fully protected, it may be doubted whether the authority of executors to sell in such a case has not been prolonged beyond reasonable limits. Thus in one case (*t*), a sale by executors thirty-three years after the death of their testator, for the purpose, as they alleged, of paying his debts, was enforced against the purchaser; and in a later case (*u*), although twenty-seven years had elapsed since the testator's death, and nine years since the death of the executor, it was held that the executors of the original executor could make a good title under the implied power of sale; and further, that they were not bound to answer the inquiry of the purchaser, whether any debts still existed which rendered a sale necessary.

Remarks on *Sabin* v. *Heape*.

It may be here remarked, with much deference to the eminent judge who decided this case, that the latter branch of the decision, although avowedly based upon *Forbes* v. *Peacock*, 1 Phill. 717, is really untouched by that authority. In *Forbes* v. *Peacock* (*x*) there was no doubt that the vendor, a sole surviving executor and trustee for sale, could sell and convey; the only question was whether he could give a good discharge for the purchase-money: and it was held, and perhaps properly held, that the charge of debts indicated an

(*r*) *Nares* v. *Burrage*, 14 Q. B. 504, *sed. qu.*; and see *Malthy* v. *Russell*, 2 S. & S. 227.

(*s*) *Bolton* v. *Stannard*, 6 W. R. 570.

(*t*) *Wrigley* v. *Sykes*, 21 B. 337. See Sug. Pow. 121.

(*u*) *Sabin* v. *Heape*, 27 B. 553.

(*x*) See the observations on this case of Jessel, M. R., in *Carlyon* v. *Truscott*, 20 Eq. 350.

intention on the part of the testator that the trustees' receipt should, under all circumstances, be a good discharge to a purchaser, and, inasmuch as the existence or non-existence of debts was immaterial, the vendor was held not bound to answer the purchaser's inquiry on the point. In *Sabin* v. *Heape*, the validity of the sale itself, at least as between the vendor and the devisees of the estate, depended upon the existence of debts. Unless the vendor knew or believed that debts existed, he was committing a fraud in selling the property; and although it may be admitted that the purchaser was not entitled to *evidence* of the existence of debts, it may yet be doubted whether, especially under the suspicious circumstances of the case, he had not a right to be assured that the vendor was professedly selling for the only purpose which could warrant a sale; and whether, even assuming (which may be also doubted) that he could have safely omitted to make the inquiry, the refusal to answer it when made was not implied notice that no debts existed. The general rule is conceived to be, that a vendor, not protected by condition, is bound, to the extent of his personal information and belief, to answer *any* question put to him by the purchaser, the answer to which may elicit matter affecting the title (*y*); and the decision in *Sabin* v. *Heape*, so far as it may appear to impugn this rule, and even its entirety, should, it is respectfully submitted, be acted upon with much caution in actual practice.

It has been held, that where twenty years have elapsed since the death of the testator it may be presumed that his debts have been paid or have become statute barred; and that a purchaser may in such a case require from executors selling under their power satisfactory proof that debts of the testator still remain unpaid (*z*). This limit of twenty years was arbitrarily fixed by Sir George Jessel with reference to the period allowed by law for the recovery of mortgage and

(*y*) But see *Re Ford and Hill*, 10 Ch. D. 365, which seems to have taken a too narrow view of the vendor's obligation to answer requisitions.

(*z*) *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465; the presumption as to payment of debts is strengthened if the beneficiaries under the will are in the enjoyment of the estate; and see *Re Molyneux and White*, 15 L. R. Ir. 383; *Re Ryan and Cavanagh*, 17 L. R. Ir. 42.

other specialty debts. A rule which, in the absence of anything to excite suspicion, relieves the purchaser from inquiry whether debts of the testator still remain unpaid, is obviously a most convenient one; nor can it be said that the period of twenty years is not, in ordinary cases, amply sufficient for the complete administration of the estate. It has been recently held in two cases that the limitation of twelve years imposed by the Real Property Limitation Act, 1874 (*a*), in regard to actions for the recovery of money charged on land, applies to the personal remedy on the covenant in a mortgage deed, or on a collateral bond, as well as to the remedy against the land (*b*); but these decisions do not curtail the period of limitation for the recovery of other specialty debts (*c*), and they do not seem to affect the rule of practice laid down by Sir George Jessel. The rule has recently been held to have no application to a sale of leaseholds by an executor (*cc*).

Trustees under power of sale.

Trustees of a mere power of sale, with the usual trusts for re-investment in real estate, ought not to sell except for some good reason (*d*); the Court, however, will not control a *bonâ fide* exercise of their discretion (*e*); but a sale by a trustee, after a *cestui que trust* has become absolutely entitled to the property, is *primâ facie* invalid (*f*). The object of the power must, however, be in each case considered, and if it may be reasonably inferred from the purpose or language of the instrument that the power was intended to remain exercisable, notwithstanding that the *cestuis que trust* have become absolutely entitled, a sale after that event has happened may be supported (*g*). Thus, the mere fact of the estate having

(*a*) 37 & 38 V. c. 57, s. 8.

(*b*) *Sutton* v. *Sutton*, 22 Ch. D. 511; *Fearnside* v. *Flint*, *ib.* 579.

(*c*) *Re Powers*, 30 Ch. D. 291.

(*cc*) *Re Whistler*, 35 Ch. D. 561.

(*d*) See *Mortlock* v. *Buller*, 10 V. 309; *Watts* v. *Gridlestone*, 6 B. 188; Sug. 70.

(*e*) Sug. Pow. 601; *Marshall* v. *Sladden*, 4 De G. & S. 468.

(*f*) *Jefferson* v. *Tyler*, 9 Jur. 1083; and see *Lantsbery* v. *Collier*, 2 K. & J. 709.

(*g*) *Re Cotton's Trustees and the London School Board*, 19 Ch. D. 624; *Peters* v. *Lewes and East Grinstead R. Co.*, 18 Ch. D. 429, 435; *Re Brown's Settlement*, 10 Eq. 349; *Re Cooke's Contract*, 4 Ch. D. 454.

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become vested in the reversioners will not destroy the trust for sale (*h*); and where the trust was to sell with the consent of the tenants for life, and after their death at discretion, and to hold the proceeds upon trusts, it was held that the trustees could make a good title after the death of the tenants for life, without the concurrence of the beneficiaries (*i*).

Validity of unlimited powers considered.

It is convenient to take this opportunity of examining a point in the law of powers, about which there is no little obscurity. It is now settled beyond question that a power in a settlement to change the nature of the interests limited is, notwithstanding the rule against perpetuities, valid, although there is no period prescribed within which the power is to be exercised (*k*).

Two theories: First theory.

Two theories have been put forward in support of the validity of such powers. The first—which appears to have the authority of Lord St. Leonards (*l*) and Lord Cairns (*m*)—is, that the exercise of the power is to be regarded as if made in the settlement which created the power. But this hypothesis is open to the apparently fatal objection that it is inconsistent with that branch of the rule against perpetuities which prescribes that property must be so limited as to admit of there being absolute ownership within lives in being, and twenty-one years afterwards from the date of the limitation, and which, therefore, excludes the qualification of such absolute ownership (*n*).

Second theory.

The second theory is, that there is an implied proviso that

(*h*) *Biggs* v. *Peacock*, 22 Ch. D. 284.

(*i*) *Re Tweedie and Miles*, 27 Ch. D. 315.

(*k*) *Boyce* v. *Hanning*, 2 C. & J. 334; *Biddle* v. *Perkins*, 4 Si. 135; *Waring* v. *Coventry*, 1 M. & K. 249; *Cole* v. *Sewell*, 4 D. & War. 1; *Wood* v. *White*, 4 M. & C. 460; *Slark* v. *Dalyns*, 10 Ch. 35, a special power of appointment among issue; *Peters* v. *Lewes R. Co.*, 18 Ch. D. 429, a power of sale; 2 Prest. Abstr. 158; Sug. Pow. 848 *et seq.*; Lewis on Perp. c. 25, and Suppl.; 1 Jarm. 255 *et seq.*

(*l*) Sug. Pow. 396, 397, 848; although in *Cole* v. *Sewell*, 4 D. & War. 32, he seems in favour of the other view.

(*m*) *Slark* v. *Dalyns*, *suprà*.

(*n*) See *Cadell* v. *Palmer*, Tud. L. C. 424, 462; Lewis on Perp. c. 13.

the power is to be exercised within either a definite (*o*), or a reasonable (*p*) period. The objections to this theory are, that it is both artificial and out of harmony with the principle of English law—that stipulations are not as a rule to be implied in instruments which are complete without them (*q*).

On the whole, it would seem that the doctrine of the validity of indefinite powers was originally laid down under a too narrow conception of the rule against perpetuities, and that it is now too firmly established, as an exception to that rule, to be questioned. But the authorities have laid down that, however unlimited the power, the exercise of it must be actually made within the legal period from the date of the settlement (*r*).

May not sell when objects of trust are satisfied.

Trustees ought not to sell after the objects of the trust are satisfied, even where their power of sale is not confined to the continuance of the trust; nor, where it is so restricted, can they exercise it after the time when, but for their own default, the trust ought to have been completed (*s*). In one case, where the limitations of the settlements were exhausted, with the exception only of a jointure secured by a term which was still subsisting, a power of sale, exercisable with the consent of the person entitled to the rents, was held to be extinguished (*t*). But where an estate was devised to trustees for different persons in specified shares, some of the beneficiaries being entitled absolutely, while the shares of others were settled upon trusts for their benefit, and the trustees had an unlimited power of sale over the whole estate, it was held that this power might be exercised so long as the trusts of any of the shares remained unperformed (*u*).

(*o*) *Lantsbery* v. *Collier*, 2 K. & J. 709.

(*p*) *Peters* v. *Lowes R. Co.*, 18 Ch. D. 429, 434.

(*q*) See *Erskine* v. *Adeane*, 8 Ch. 756, 763, per Mellish, L. J.

(*r*) *Wood* v. *White*, 4 M. & C. 460, 482; *Wallis* v. *Freestone*, 10 Sim. 225; *Lantsbery* v. *Collier*, *Peters* v. *Lowes R. Co.*, *supra*; Sug. Pow. 849.

(*s*) *Wood* v. *White*, 2 Ke. 664, 669.

(*t*) *Wolley* v. *Jenkins*, 23 B. 53, 63. But see *Vine* v. *Raleigh*, 21 Ch. D. 238, a case under the S. E. Act.

(*u*) *Tate* v. *Swinstead*, 26 B. 525.

Chap. II. Sect. I.

Fictitious sale by, set aside.

Where a transaction, apparently a sale under the ordinary power, was in fact a mere contrivance to raise money for the purpose of its being advanced to the tenant for life, under a power of advancement in the settlement, it was set aside as a fraud upon the power of sale (*x*).

Time fixed by author of trust cannot be anticipated.

When the instrument creating the trust fixes the time for sale, this cannot be anticipated either by the trustees or the Court, however injurious the delay may be to the estate; *e.g.*, where a testator directed an advowson to be sold *upon the death of A., the incumbent*, the Court held that it had no jurisdiction to sell in A.'s lifetime, although upon his death it would be necessary to present a new incumbent before any sale could be effected (*y*); and where trustees, with the consent of the tenant for life and of some of the *cestuis que trust*, attempted to sell in anticipation, they were not allowed costs of the attempted sale and litigation, as against the *cestuis que trust* who were under disability (*z*). But where an estate was devised to A. for life, and after her death to trustees upon trust to sell as soon as conveniently might be after the testator's death, the trustees, with the concurrence of A., were held to make a good title (*a*). And notwithstanding an imperative direction to sell, trustees may, with the sanction of the Court, postpone a sale, where strict compliance with the terms of their trust is clearly disadvantageous to the parties beneficially interested (*b*).

May be postponed, when.

Acceleration by surrender of prior interest.

The ordinary power of sale and exchange may, it seems, be accelerated by the surrender of a prior life interest, for this does not prejudice the estate of the remainderman, but only changes the nature of the property; but where powers of charging are limited to successive tenants for life when in

(*x*) *Robinson* v. *Briggs*, 1 S. & G. 188.

(*y*) *Johnstone* v. *Baber*, 8 B. 233; see *Blacklow* v. *Laws*, 2 Ha. 40; *Gosling* v. *Carter*, 1 Coll. 652; *Want* v. *Stallibrass*, L. R. 8 Ex. 175.

(*z*) *Leedham* v. *Chawner*, 4 K. & J. 458.

(*a*) *Mills* v. *Dugmore*, 30 B. 104.

(*b*) *Morris* v. *Morris*, 4 Jur. N. S. 802.

possession, the power given to a tenant for life in remainder must await the regular determination of the previous limitations, and cannot be accelerated by the surrender of a prior life interest (*c*).

Reversion may be sold to prejudice of remainder-man under express power.

On the other hand, where a settlement of a reversion in terms authorized a sale at any time with the consent of the tenant for life under such settlement, it was held that the trustees might proceed to an immediate sale, although its effect would be, under the trusts declared of the purchase-money, to vary the rights of the *cestuis que trust* by giving such tenant for life an immediate income (*d*).

Power to convert, &c., should be exercised for general benefit.

But trustees, in exercising discretionary powers of changing the nature of the trust estate, ought not to be influenced by any desire to benefit one *cestui que trust* at the expense of another (*e*): and if one of several *cestuis que trust*, *e.g.* a tenant for life, having an absolute irresponsible discretionary power of giving or withholding his consent to a sale by the trustees, become himself a trustee, he is thereby precluded from withholding or giving his consent to a sale, with a view more to his own interest than to that of the other beneficiaries (*f*). Where there is a tenant for life without impeachment of waste, trustees with powers of sale and exchange should be particularly careful not so to exercise them as to enable him to take undue advantage of his rights in respect to timber and minerals (*g*).

Tenant for life selling under Settled Land Act.

Under the Settled Land Act (*h*), a tenant for life, in exercising the new statutory powers, is to have regard to the

(*c*) *Trull* v. *Tysson*, 21 B. 437.

(*d*) *Clark* v. *Seymour*, 7 Si. 67; and see *Tasker* v. *Small*, 6 Si. 625; *Blackwood* v. *Borrowes*, 4 D. & War. 411; *Giles* v. *Homes*, 15 Si. 359; *Minet* v. *Leman*, 7 D. M. & G. 340, 351; cf. *Tewart* v. *Lawson*, 18 Eq. 490.

(*e*) *Raby* v. *Ridehalgh*, 7 D. M. & G. 104.

(*f*) *Lord* v. *Wightwick*, 4 D. M. & G. 808.

(*g*) As to the rights of a tenant for life impeachable for waste in respect of timber and minerals under the Settled Land Act, see sects. 11 and 35, and *Hallard* v. *Moody*, 31 Ch. D. 504.

(*h*) See sect. 53.

interests of all parties entitled under the settlement, and, in relation to the exercise thereof, is to be deemed to be in the position, and to have the duties and liabilities of a trustee for those parties. In selling under the Act, he must sell as fairly as trustees must sell for the tenant for life and for those in remainder (*i*); and, in order further to protect the remaindermen against an undue exercise of the powers, the Court, in appointing new trustees, on whom the statutory notices are to be served, will select independent persons (*k*).

Conditional powers of and trusts for sale.

Powers of, and trusts for, sale are often exercisable only under certain specified conditions: when this is the case, and a sale is made in breach of a condition, the purchaser's safety seems to depend upon the following considerations, viz.: 1st, whether the condition is subsequent or precedent; and, 2ndly, whether it affects the title to the legal estate. If it affect merely the equitable title, an apt declaration in the instrument creating the trust or power will protect a purchaser against the non-performance of a precedent, and, *à fortiori*, of a subsequent condition; as in the case of an ordinary power of sale in a mortgage, which usually contains a precedent condition that certain notices shall have been given, and defaults made in payment, but with a declaration relieving purchasers from liability for a breach of such condition. If, on the other hand, the exercise of a power is to affect the legal estate, as where land is limited in strict settlement, and a power is given to trustees, in certain specified events, to sell, and, for that purpose, to revoke the old and appoint new uses, here, unless the required events occur, the old limitations remain unaffected, notwithstanding any attempted exercise of the power; and any declaration that purchasers shall not be bound to see that the events have happened, would, it is conceived, be inoperative (*l*).

Subsequent and precedent condition.

(*i*) Per Pearson, J., in *Wheelwright* v. *Walker*, 23 Ch. D. 752, 762.

(*k*) *Wheelwright* v. *Walker*, *ubi suprà*; *Re Kemp's S. E.*, 24 Ch. D. 485.

(*l*) See *Doe* v. *Martin*, 4 T. R. 39; *Watkins* v. *Williams*, 21 L. J., Ch. 601; *Ferrand* v. *Wilson*, 4 Ha. 385; and a singular case of *Hougham*

Chap. II. Sect. 1.

Protection of purchaser from mortgagee and tenant for life.

By the Conveyancing Act, 1881, a *bonâ fide* purchaser is protected on a purchase from a mortgagee selling under the powers conferred by the Act (*m*). And in the case of a sale under the Settled Land Act a purchaser, dealing in good faith, is to assume that the requisitions of the Act have been complied with (*n*).

The usual clause in mortgage deeds that a purchaser shall not be bound to inquire as to the propriety or regularity of the sale, and that notwithstanding any impropriety or irregularity, the same shall, so far as he is concerned, be deemed to be within the power, though it relieves him from the obligation to inquire, does not protect him if he has notice of anything which throws a doubt upon the validity of the sale (*o*).

Section 2.

Manner of sale.

Power to sell only by auction,

(2.) *Manner of sale.*

An agent or trustee, simply authorized to sell by public auction, either generally or even for a specified sum, cannot, whatever price be offered, sell by private contract (*p*); but in one or two cases, after an abortive attempt to sell by public auction, subject to a reserved bidding, a sale by the trustee or agent by private contract at the reserved price has been upheld, and the title has, under special circumstances, been forced on the purchaser (*q*).

or only by private contract.

And an express authority to sell by private contract, would not, it is conceived, justify a sale by auction (*r*); unless the

v. *Sandys*, 2 Si. 95, 115; and see, as to the construction of discretionary trusts for sale, *Lord Rendlesham* v. *Meux*, 14 Si. 249; *Bird* v. *Fox*, 11 Ha. 40.

(*m*) As to conditions precedent to the exercise of those powers, by sect. 21; as to payment of the purchase-money, by sect. 55; and as to a purchase under a sale by order of the Court, by sect. 70; see *Re Hall Dare's Contract*, 21 Ch. D. 41.

(*n*) Sect. 54; and see *Duke of Marlborough* v. *Sartoris*, 32 Ch. D. 616.

(*o*) *Jenkins* v. *Jones*, 6 Jur. N. S. 391; *Parkinson* v. *Hanbury*, 1 Dr. & S. 143; and see *Ford* v. *Heely*, 3 Jur. N. S. 1116, *Selwyn* v. *Garfit*, 56 L. T. 699. As to constructive notice, see sect. 3 of the Conveyancing Act, 1882; and *post*, p. 969 *et seq.*

(*p*) *Daniel* v. *Adams*, Amb. 495; *In re Loft*, 8 Jur. 206; Sug. 56, *et seq.*

(*q*) *Else* v. *Barnard*, 28 B. 228; *Bousfield* v. *Hodges*, 33 B. 90; *sed qu.*

(*r*) See and consider *Daniel* v. *Adams*, Amb. 495.

Chap. II. Sect. 2.

To A., does not authorize sale to B.

authority were to sell for a specified sum, and the price obtained at the auction (after payment of the incidental expenses) exceeded or equalled that amount. Nor does an authority to sell to A. for a specified sum, necessarily justify a sale to B. for that (or, it is conceived, any greater) sum (s).

As to trusts created since 28th August, 1860.

Under Lord Cranworth's Act (now repealed), trustees who by express declaration had a *power* of sale over hereditaments, might, unless the trust instrument directed the contrary, sell either by public auction or private contract, as they deemed most advantageous (t). Whether this provision applied to a case where there was an imperative *trust* for sale, was doubted, but never judicially determined (u). Now, under the Conveyancing Act, 1881, where a trust for sale or power of sale is vested in trustees, they may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or private contract, subject to any such conditions respecting title or evidence of title, or other matter, as they think fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale, and to resell, without being answerable for any loss; but this power is only exercisable subject to the terms and provisions of the instrument by which it is created (x).

Sale by estate agent.

An ordinary estate agent, who has not been instructed as to what conditions as to title, &c., are necessary in respect of the estate for which he has been instructed to find a purchaser at a specified price, is not justified in signing an absolute contract on behalf of the owner (y).

(s) *Bulteel* v. *Lord Abinger*, 6 Jur. 410.

(t) 23 & 24 V. c. 145, ss. 1, 32, 34; which are now repealed by the Settled Land Act, s. 64.

(u) See 3 Dav. 565.

(x) See sect. 35, which applies only to a trust or power created by an instrument coming into operation after the 31st December, 1881.

(y) *Hamer* v. *Sharp*, 19 Eq. 108; *Mullens* v. *Miller*, 22 Ch. D. 194. But his authority may empower him to enter into a binding contract. *Saunders* v. *Dense*, 52 L. T. 644.

Sale by trustee of bankrupt under the Act of 1869;

Under the Bankruptcy Act, 1869, the trustee had power to sell all the property of the bankrupt, by public auction or private contract, with power, if he thought fit, to transfer the whole thereof to any person or company, or to sell the same in parcels (*z*).

Under the Bankruptcy Act, 1883 (*a*), the creditors may appoint a trustee, subject to the approval of the Board of Trade (*b*), and also a committee of inspection. Until the appointment of a trustee the official receiver acts in that capacity (*c*), the property being vested in him; but on the appointment of a trustee the property passes to and becomes vested in him (*d*), and the certificate of appointment is, for the purposes of registration, enrolment, &c., to be deemed a conveyance (*e*). Subject to the provisions of the Act, the trustee may (without the consent of the committee) sell the property of the bankrupt by public auction or private contract, and transfer it to any person or company, or sell it in parcels (*f*). He may also give receipts for money received by him, exercise powers, and deal with any property to which the bankrupt is beneficially entitled as tenant in tail, in the same manner as the bankrupt might have exercised them, or dealt with it (*g*). The positive rights and powers of a trustee in bankruptcy do not seem to be materially altered by the recent Act.

or mortgagees, trustees, or agents.

Mortgagees, trustees and agents for sale, may, in the absence of restriction, sell by private contract or public auction (*h*); and though not bound to offer the estate to public competition, before disposing of it privately (*i*), they should, as a general rule, unless specially authorized to sell by private

(*z*) 32 & 33 V. c. 71, s. 25.

(*a*) 46 & 47 V. c. 52.

(*b*) Sect. 21.

(*c*) Sect. 54, sub-ss. 1—3; and he may, during the interval between the adjudication and the appointment of a trustee, sell the property of the bankrupt; *Turquand* v. *Board of Trade*, 11 Ap. Ca. 286.

(*d*) Sect. 54, sub-s. 2.

(*e*) Sect. 54, sub-s. 4.

(*f*) Sect. 56, sub-s. 1.

(*g*) Sect. 56, sub-ss. 2, 4 and 5.

(*h*) Sug. 61.

(*i*) *Davey* v. *Durrant*, 1 D. & J. 535, 538, case of mortgagee selling under power; *Harper* v. *Hayes*, 2 D. F. & J. 542, case of trustee.

contract, sell by auction, to avoid questions with their beneficiaries, as to whether the price obtained was adequate (*k*).

Estate may be sold in parcels.

But not in undivided shares: *semble.*

They may also, as a general rule, sell either altogether or in parcels (*l*); subject of course to a liability to be called to account in Equity if they adopt a mode of sale which is clearly depreciatory: but it may be doubted whether, even at Law, a power (*m*) of sale, unless it contained expressions pointing to such a mode of dealing with the estate, would be well exercised by a sale of an undivided share. They may (*n*) concur with the owners of other properties in a joint sale, where obviously beneficial to their *cestuis que trust*, and it may even be their duty to do so (*o*). It has been decided that trustees for sale under a settlement must sell the standing timber with the estate, although the tenant for life be unimpeachable for waste (*p*); and that a sale of the estate, apart from the timber, is void at Law (*q*); so where the trust is to sell for payment of debts or other limited purposes, and subject thereto the estate is settled on A. for life, with remainders over, the trustees may not fell and dispose of the timber, instead of selling the fee simple of part of the estate (*r*); the same doctrine applies to a reservation of minerals, or any other part of the inheritance, upon a sale by fiduciary ven-

Standing timber, &c., must be sold with the fee;

(*k*) See as to trusts and mortgages created since 28 Aug., 1860, 23 & 24 V. c. 145, and as to those created since 31 Dec. 1881, the Conveyancing Act, 1881, ss. 19 and 35.

(*l*) Sug. 61. It appears that a trust for sale of "any part of" an estate, at the discretion of the trustees, would authorize a sale of the entirety; *Lord Rendlesham* v. *Mina*, 14 Si. 249; *Cooke* v. *Farrand*, 7 Taun. 122.

(*m*) Chance on Powers, 241.

(*n*) See Conv. Act, 1881, s. 35.

(*o*) See *Cooper and Allen's Contract*, 4 Ch. D. 802; *Cavendish* v. *Cavendish*, 10 Ch. 319; *Morris* v. *Debenham*, 2 Ch. D. 540, which, in effect, repeal the supposed rule in *Rede* v. *Oakes*, 4 D. J. & S. 505. But the principle does not extend to the case of a joint *lease; Tolson* v. *Sheard*, 5 Ch. D. 19.

(*p*) *Cockerell* v. *Cholmeley*, 1 R. & M. 418; see *Watlington* v. *Waldron*, 23 L. J. Ch. 713; *Buckley* v. *Howell*, 29 B. 546.

(*q*) *Cholmeley* v. *Paxton*, 3 Bing. 207.

(*r*) *Davies* v. *Wescomb*, 2 Si. 425; *Marker* v. *Kekewich*, 8 Ha. 299: but see *Kekewich* v. *Marker*, 3 M. & G. 311. See a case of *Silvester* v. *Bradley*, 13 Si. 75, where it was unsuccessfully contended that the inheritance of the timber was, in Equity, severed from the inheritance of the soil; and *Butler* v. *Borton*, 5 Mad. 40. See, too, *Bennett* v. *Wyndham*, 23 B. 521.

dors (s); although special circumstances, such as local custom, or the peculiar nature of the property, may occasionally render such a mode of sale desirable and proper. Where a will empowered trustees with the consent of the tenant for life, who was unimpeachable for waste, to sell all or any part of the settled lands, it was held that they could not sell the surface, reserving the minerals (t). This decision led to the passing of the 25 & 26 Vict. c. 108, which after giving retrospective validity to sales, &c., from which the minerals were excepted, enabled trustees or donees of a power of sale, to dispose of land with a reservation of minerals, and either with or without powers of working the same, or of minerals apart from the surface; but the sanction of the Court had to be previously obtained (u). A special authority to sell minerals and easements apart from the surface, or *vice versâ*, is now commonly inserted in well-drawn instruments, in appropriate cases.

so also minerals;

except under the Confirmation of Sales Act;

So, under the Settled Estates Act, 1877 (x), the Chancery Division of the High Court may authorize a sale of mines apart from the surface, or *vice versâ* (y).

or the Settled Estates Act.

And now, by sect. 17 of the Settled Land Act, a sale, exchange, partition or mining lease may be made either of land, with or without an exception or reservation of all or any of the mines and minerals, and in any such case with or without a grant or reservation of powers of working, way-leaves or rights of way, rights of water and drainage, and other powers, easements, rights and privileges for or incident to or con-

Settled Land Act.

(s) But not (it is conceived) to a reservation of *mines*, on sales to Railway or Waterworks Companies; see 8 V. c. 20, s. 77, and 10 V. c. 17, s. 18. As to what are mines within sect. 77 of 8 V. c. 20, see *Midland Ry. Co.* v. *Haunchwood Brick and Tile Co.*, 20 Ch. D. 552, and *post*, p. 130.

(t) *Buckley* v. *Howell*, 29 B. 516; and *vide post*, Ch. XIX. s. 2.

(u) As to what are minerals within the Act, see *In re Brown's Est.*, 11 W. R. 19, and generally as to what are minerals, *Darvill* v. *Roper*, 3 Dr. 294; *Earl of Rosse* v. *Wainman*, 14 M. & W. 859; *Hext* v. *Gill*, 7 Ch. 699, 712; and *post*, p. 130.

(x) 40 & 41 V. c. 18, s. 19.

(y) See *Re Mallin*, 3 Giff. 126; *Re Law*, 7 Jur. N. S. 511; *Re Milwards' Est.*, 6 Eq. 248; *Re Gray's S. E.*, W. N. (1875), 106; *post*, p. 1279.

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nected with mining purposes, in relation to the settled land, or any part thereof, or any other land. And an exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals. As this section is retrospective, an application to the Court under the Confirmation of Sales Act is now no longer necessary.

Excessive sale for limited purpose.

Where the trust is to sell for purposes which may, but will not necessarily, require a sale of the entirety, a purchaser need not see that no more is sold than is requisite (*z*).

Advertisements.

Fiduciary vendors are also bound to use all reasonable diligence to obtain a fair price (*a*): if, therefore, they sell by auction they should give due notice of and advertise the sale: and if the estate have been advertised to be sold in one particular manner (as in lots), they should not sell in any other way (as altogether, or under a different plan of allotment) without re-advertising the sale in accordance with the proposed alterations (*b*). But when a binding contract has been entered into to sell at a fair price, they cannot break it off in order to accept a higher offer (*c*).

As to sales for building purposes.

A trust to sell land as building land, has been held to authorize the trustees to set it out and make the necessary roads, and pay the expenses out of the proceeds of sale (*d*). Where land is sold for building purposes, under the ordinary power of sale and exchange, a difficulty often occurs in practice as to the laying out of the roads and as to the feasibility of securing to purchasers a right of way over such roads. The best plan seems to be to let each lot comprise a moiety of the adjacent road, *usque ad medium viæ;* and to reserve rights of way over it in favour of the purchasers of neighbouring lots; and it is conceived that such a reservation, over land actually

(*z*) *Spalding* v. *Shalmer*, 1 Vern. 301; *Dolton* v. *Hewen*, 6 Mad. 9; Sug. 658; *Thomas* v. *Townsend*, 16 Jur. 736.

(*a*) *Downes* v. *Grazebrook*, 3 Mer. 208.

(*b*) *Ord* v. *Noel*, 5 Mad. 438; see p. 441.

(*c*) *Goodwin* v. *Fielding*, 4 D. M. & G. 90. See *Harper* v. *Hayes*, 2 D. F. & J. 542.

(*d*) *Coolson* v. *Lee*, 23 L. J. Ch. 473.

sold under the power, would be supported: but this does not get rid of the difficulty in respect to so much of the roads as have to be formed over plots which remain undisposed of, the common power not apparently authorizing the sale of mere easements over lands which may possibly be retained in settlement. It is very desirable in settlements and wills affecting land which is likely to be used for building, to insert special clauses providing for these and other difficulties, which in modern practice often interfere with the advantageous letting or sale of property as a building estate.

Under Settled Estates Act.

Under the Settled Estates Act, 1877, the Court has power to direct that any part of the settled estates shall be laid out for streets, squares, gardens, sewers, &c., either to be dedicated to the public or not; and also to direct such works to be executed, and the costs thereof to be raised, by a sale or mortgage of any part of the settled estates (*e*).

Under Settled Land Act.

Under the Settled Land Act a tenant for life may sell any easement, right or privilege of any kind over or in relation to the settled land (*f*); and on or in connection with a sale or grant for building purposes, or a building lease, he may, for the general benefit of the residents on the settled land, or any part thereof, cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously or on payment, of the public or of individuals; with sewers, drains, watercourses, fencing, paving, or other works necessary or

(*e*) Sects. 20 and 21, and see *post*, p. 1279. As to the more limited powers of the Court under the Act of 1856, see *Re Hurle's S. E.*, 2 H. & M. 196; *Re Venour's S. E.*, 2 Ch. D. 525; *Re Chambers' S. E.*, 28 B. 653. As to the object of these provisions, see *Re Poynder's S. E.*, 50 L. J. Ch. 753.

(*f*) Sect. 3, sub-s. 1. Whether this section authorizes the extinction of an easement which is appurtenant to the settled land as dominant tenement seems doubtful. By the interpretation clause of the Act land includes incorporeal hereditaments; but an easement is not, legally speaking, a hereditament, but only an appurtenant right (see *G. W. R. Co.* v. *Swindon, &c. R. Co.*, 22 Ch. D. 677). Such a power, though not in terms given by the section, may be reasonably held to fall within it. And see Hood & C. 269.

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proper in connection therewith (*g*), and the Act contains provisions for securing such appropriation. The cost of executing such works may be defrayed out of capital monies arising under sect. 21 of the Act, or by a sale or mortgage under sect. 21 of the Settled Estates Act, 1877.

As to the effect of reserving the roads upon a sale of land in a mineral district.

It sometimes happens that upon the sale in lots of a large estate, roads, which have been made by the vendor for the purposes of access to the several portions of the property, are reserved to him. In a case which came under the author's notice, the effect, although unintended, of such a reservation was to secure to the vendor an undue advantage by interposing a barrier which enabled him to preclude the purchasers from working by outstroke valuable minerals which were found to exist under the property.

Sale under mortgage.

A trustee for sale in a mortgage deed should not sell without notifying his intention to the mortgagor (*h*); nor can a mortgagee sell pending a suit to redeem (*i*); and he sells at his own risk if a tender has been made him of his principal, interest, and costs (*k*). Where an equity of redemption was conveyed to a second mortgagee upon trust to sell, and out of the proceeds to pay off the first mortgage, then the second mortgage, and to pay the surplus to the mortgagor, it was held that the trust was duly carried out by a sale *subject* to the first mortgage (*l*).

Oppressive sale by mortgagee not necessarily invalid.

But a sale by a mortgagee, although harsh and improvident, will not be set aside in Equity, if clearly within the terms of the power (*m*); nor will a mere offer, unaccompanied

(*g*) Sect. 16.

(*h*) *Anon.*, 6 Mad. 10.

(*i*) *Rhodes* v. *Buckland*, 16 B. 212.

(*k*) *Jenkins* v. *Jones*, 2 Gif. 99. As to a mortgagee's power to make a title after satisfaction, or alleged satisfaction, of his mortgage debt, see *Dicker* v. *Angerstein*, 3 Ch. D. 600. Probably a purchaser would be protected, if *bonâ fide*, by sect. 22 (1) of the Conveyancing Act, 1881; but *secus*, if he had actual notice; *Jenkins* v. *Jones*, *supra*.

(*l*) *Manser* v. *Dix*, 3 Jur. N. S. 252.

(*m*) *Dicker* v. *Angerstein*, 3 Ch. D. 600; and see sect. 21 (2) and sect. 22 (1) of the Conveyancing Act,

by actual tender, of the amount due to him, be sufficient to prevent a sale (*n*). And so long as anything remains due on the security, a mortgagee may pursue all his remedies concurrently (*o*); and since the Judicature Acts he may do so in the same action, and may at the same time obtain personal judgment for the debt and judgment for foreclosure (*p*); but where on a sale he allows his agent to receive the sale moneys, he cannot, if they are mis-applied or lost, sue the mortgagor for the mortgage debt (*q*). If acting *bonâ fide*, a mortgagee can only be stopped by tender of principal, interest, and costs (*r*); and it would require a strong case to induce the Court to restrain an intended sale by a mortgagee under special conditions, on the ground of their undue stringency (*s*); but of course if the sale be clearly oppressive, as *e.g.* where the mortgagee overstates the amount of his debt, and thus deters the person entitled to redeem from paying it off, the Court will interfere (*t*). The established rule, in fact, is that the Court will only stay a sale on tender of what the mortgagee swears to be due (*u*); but if it is clear on the surface that less is due than the sum to which the mortgagee swears, and tender is made of what is manifestly due, the Court will restrain

1881. As to how far the mortgagee when exercising his power is a trustee, see *Warner* v. *Jacob*, 20 Ch. D. 220; and see *Nash* v. *Eads*, 25 Sol. J. 95; and see *ante*, p. 35.

(*n*) See *Matthie* v. *Edwards*, 2 Coll. 465; on app., 11 Jur. 761; *Grugeon* v. *Gerrard*, 4 Y. & C. 119. Money paid for expenses by mortgagor to mortgagee's solicitor, under a threat of an exercise of a power of sale, but not really due, may, it seems, be recovered at Law; *Close* v. *Phipps*, 7 Man. & G. 586.

(*o*) *Lockhart* v. *Hardy*, 9 B. 354; *Cockell* v. *Bacon*, 16 B. 158; *Dymond* v. *Croft*, 3 Ch. D. 512; *Wood* v. *Wheater*, 22 Ch. D. 281.

(*p*) *Farrer* v. *Lacy Hartland*, 31 Ch. D. 42; *Greenough* v. *Little*, 15 Ch. D. 93. Where a puisne mortgagee, against whom judgment for foreclosure has been obtained, makes a proper offer to disclaim, the plaintiff is entitled to no further costs against him; *Grace* v. *Foster*, 22 Ch. D. 566. An order for sale may now be obtained after judgment for foreclosure, at any time before it is made absolute; *Union Bank* v. *Ingram*, 20 Ch. D. 463.

(*q*) *Palmer* v. *Hendrie*, 28 B. 311; *Rudge* v. *Rahers*, L. R. 8 C. P. 358.

(*r*) *Paynter* v. *Carew*, Kay, xxxvi.

(*s*) *Kershaw* v. *Kelsw*, 1 Jur. N. S. 974.

(*t*) *Jenkins* v. *Jones*, 2 Giff. 99; and cf. *Prichard* v. *Wilson*, 10 Jur. N. S. 330.

(*u*) *Hill* v. *Kirkwood*, 28 W. R. 358.

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Notice of sale.

a sale (*x*). But the Court will always restrain a sale, if the mortgagee holds a fiduciary relationship towards the mortgagor (*y*). Where, as is usually the case, the power is exercisable only upon notice, a contract for sale is not invalid by reason of its being entered into before the expiration of notice duly given (*z*): nor need notice be given if not required by the terms of the power (*a*). In one case, which cannot be regarded as satisfactory, a purchaser was compelled to take a conveyance without the mortgagor's concurrence, although it was apparent from the dates of the instruments that the required notice had not been given (*b*); but it was more recently held, that the clause protecting a purchaser from inquiring whether due notice has been given is unavailing if he buys with the knowledge that notice has not been given (*c*).

When to be given to the assigns of the mortgagor.

Where the equity of redemption has been incumbered, and the power does not contain the usual clause making an irregular sale valid as in favour of a purchaser, a sale without the required notice—if required by the terms of the power to be given to the *assigns* of the mortgagor (*d*)—is invalid as against the subsequent incumbrancers, even although the mortgagor expressly waive the notice and consent to the sale (*e*). A notice fairly given pursuant to the terms of the power is valid, although the party on whom it is served is an infant (*f*); so, too, it would seem, if he is a lunatic (*g*), or totally blind, or deaf (*h*); and the Court is slow to interfere

(*x*) *Hickson* v. *Darlow*, 23 Ch. D. 690.

(*y*) *Macleod* v. *Jones*, 24 Ch. D 289.

(*z*) *Major* v. *Ward*, 5 Ha. 598, which also see, as to mode of giving notice.

(*a*) *Darcy* v. *Durant*, 1 D. & J. 535, but see *Cockburn* v. *Edwards*, 18 Ch. D. 449; *Craddock* v. *Rogers*, 53 L. J. Ch. 968; cf. *Pooley's Trustee* v. *Whetham*, 33 Ch. D. 111.

(*b*) *Ford* v. *Heely*, 3 Jur. N. S. 1116.

(*c*) *Parkinson* v. *Hanbury*, 1 Dr. & S. 143, where there was no person in existence to whom the notice could be given: *Selwyn* v. *Garfit*, 56 L. T. 699.

(*d*) It is very desirable to omit the word "assigns" from the clause requiring notice.

(*e*) *Forster* v. *Hoggart*, 15 Q. B. 155; *Hoole* v. *Smith*, 17 Ch. D. 434.

(*f*) *Tracy* v. *Laurence*, 2 Dr. 403.

(*g*) *Robertson* v *Lockie*, 15 Sj. 285; *Mellersh* v. *Keen*, 27 B. 236, cases of notice of a dissolution of partnership.

(*h*) *Robertson* v. *Lockie*, *suprà*.

as against a *bonâ fide* purchaser: thus, where notice was given by the mortgagee of an intention to sell, if payment was not made at the end of six months from the date, but was not actually served till nearly three weeks afterwards, it was held that the notice was not invalid; the sale not having been made until more than six months had elapsed since the delivery of the notice (*i*). Subsequent negotiations between the mortgagee and mortgagor may amount to waiver of a notice duly given (*k*).

Notice to be given under the Conveyancing Act, 1881.

In the case of a mortgage of hereditaments, executed after the 31st December, 1881, three months' notice in writing must, unless the deed otherwise directs, be given to the person or one of the persons entitled to the property subject to the charge, or be affixed on some conspicuous part of the property, before the statutory power of sale can be exercised; but the purchaser's title is not to be impeached on the ground that no case had arisen to authorize the exercise of the power, or that no such notice had been given (*l*).

Sale under depreciatory conditions improper.

Fiduciary vendors are not, without special authority (*m*), justified in selling under any unnecessary and depreciatory special conditions (such as a condition that the purchaser shall take, at a valuation, fixtures belonging to a third person); or that he shall take the property saddled with a disadvantageous contract into which they have improvidently entered (*n*); or conditions unnecessarily restrictive of the purchaser's right to a marketable title: it is by no means clear that, under such circumstances, they can make a title which a purchaser can be advised to accept (*o*). They should, however, take care that

(*i*) *Metters* v. *Brown*, 9 Jur. N. S. 958.

(*k*) *Tommey* v. *White*, 3 H. L. C. 49; *Davy* v. *Durant*, 1 D. & J. 535; *Metters* v. *Brown*, *supra*.

(*l*) 44 & 45 V. c. 41, s. 20.

(*m*) They are expressly protected in the direct employment on tacit adoption of the provisions and forms of the Conveyancing Act, 1881; see sect. 66.

(*n*) *Marriott* v. *Anchor Reversionary Co.*, 3 D. F. & J. 177; *Dance* v. *Goldingham*, 8 Ch. 902; *Dunn* v. *Flood*, 28 Ch. D. 586; *Re Rayner's Trustees and Greenaway*, 53 L. T. 495.

(*o*) *Bonner* v. *Johnston*, 1 Mer. 268; 1 Dav. 440.

their title to the property as described in the particulars is good, or that the defect is guarded against by apt conditions; and where from neglect in this respect a mortgagee failed in a suit against a purchaser for specific performance, he was disallowed the costs of the suit as against the mortgagor (*p*).

What are not depreciatory.

But, even without express authority, a fiduciary vendor may, it is conceived, insert a condition enabling him to rescind the contract, in the event of the purchaser insisting on an objection, which he is unable or unwilling to remove; for though such a condition may, in a certain sense, be depreciatory, yet it is one which a prudent owner, selling in his own right, would introduce (*q*). So, too, a condition that part of the purchase-money, such part not exceeding the amount of the mortgage-debt, may remain on the security of the property, is free from objection (*r*).

Trustee vendor under V. & P. Act, 1874, and Conveyancing Act, 1881.

By the Vendor and Purchaser Act, 1874 (*s*), trustees who are either vendors or purchasers may sell or buy without excluding the application of the rules which by the Act, in the absence of any stipulation to the contrary, now govern the obligations and rights of vendor and purchaser. And by the Conveyancing Act, 1881, trustees, whether they employ a solicitor or not, are protected from the consequences of not excluding the stipulations implied by the Act (*t*).

Mortgagee's power to sell under Conveyancing Act, 1881.

A mortgagee of hereditaments, whose security is subsequent to the 31st December, 1881, may, unless restricted by the terms of the instrument, sell, subject to such conditions as he may think fit to make, and may rescind or vary contracts for sale, and buy in and re-sell the property (*u*); and a trustee selling in execution of a trust or power created by an instrument coming into operation since that date, may sell subject to any such stipulations as he shall think fit (*x*); but, of

(*p*) *Peers* v. *Ceeley*, 15 B. 209.

(*q*) *Falkner* v. *Equitable Reversionary Co.*, 4 Dr. 352, and the V.-C.'s judgment.

(*r*) *Davey* v. *Durrant*, 1 D. & J. 535, *post*, p. 90.

(*s*) 37 & 38 V. c. 78, ss. 2 and 3.

(*t*) Sect. 66.

(*u*) 44 & 45 V. c. 41, s. 19.

(*x*) *Ibid.* s. 35. Cf. sects. 1 and 2 of 23 & 24 V. c. 145, now repealed.

course, this will not justify him if he insert conditions which are not warranted by the state of the title, or the circumstances of the property.

Sale by mortgagee at request, for purpose of clearing a title.

Where an estate in mortgage is contracted to be sold by parties claiming the equity of redemption, and difficulties arise upon the title subsequent to the mortgage, it often happens that the mortgagee, if he has a power of sale, is requested to exercise it, for the purpose of getting rid of the difficulty; and doubts are often expressed as to the validity of the scheme, or, at any rate, whether the mortgagee can safely comply with the request. Assuming, as, of course, must be assumed, that the power is exercisable according to its terms, and the mortgagee chooses to receive his money, and to obtain it by means of the power, it is clear that no valid objection can be made to such an arrangement, motive being immaterial in the exercise of a legal right. A man taking merely that which belongs to him, by means of the security which he has contracted for, does not act improperly in so doing, merely because one principal reason for his calling in the money is a wish to benefit another person.

Trustees, &c. employing agent, are responsible for his acts.

If trustees employ an agent to sell, or confide the sale to a co-trustee, &c., they will be responsible for his acts (*y*).

Consent of tenant for life under Settled Land Act.

By the Settled Land Act, in case of conflict between the provisions of a settlement and the provisions of the Act, relative to any matter in respect whereof the tenant for life exercises or contracts, or intends to exercise any power under the Act, the provisions of the Act are to prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life is, by virtue of the Act, necessary to the exercise by the trustees of the settlement or other

(*y*) *Re Lord Lichfield*, 1 Atk. 87; *Oliver* v. *Court*, 8 Pr. 127, 167; *Bruce* v. *Stokes*, 11 V. 319; 2 Wh. & T. L. C.; and see *Styles* v. *Guy*, 1 M. & G. 422, and generally as to the employment of an agent in the ordinary course of business, and not involving a delegation of the trust; see *Speight* v. *Gaunt*, 22 Ch. D. 727; 9 Ap. Ca. 1.

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person of any power conferred by the settlement, exercisable for any purpose provided for in the Act (z). But it has been held that, where there is an absolute trust for sale, or where a sale is ordered by the Court, the consent of the tenant for life is not requisite (a).

Sale with *consent*, what consent sufficient.

It seems to be doubtful whether, when a power of sale is exercisable only with a specified consent, a general prospective consent is sufficient (b); or whether there must not be a consent to the particular sale: but it would seem that consent given after the execution of the power is sufficient (c). Where consent in writing is required by the terms of the power, a parol consent, even though followed by an act of part performance by the consenting party, will not be sufficient (d). Where property was devised upon trusts for sale, but not without the consent of certain specified persons who were legatees of the proceeds, and the trustees, after the death of one of the legatees, but with the concurrence of the person beneficially entitled to his share and with the consent of the remaining legatees, contracted to sell the property, the title was considered too doubtful to be forced on a purchaser (e). We have seen that a consent is not necessarily invalid by reason of its effect being to benefit the consenting party (f). In the case of a lunatic, the committee may consent by order of the Chancellor (g); and where a tenant for life, whose consent is necessary to a sale, becomes bankrupt, a good

(z) Sect. 56, sub-sect. 2.

(a) *Taylor* v. *Poncia*, 25 Ch. D. 646; and see *Duke of Newcastle's S. E.*, 24 Ch. D. 129.

(b) See *Hawkins* v. *Kemp*, 3 East. 410, 427. Under the Settled Land Act, 1882, it was held that a general prospective notice of an intention to sell was not sufficient; *Re Ray's S. E.*, 25 Ch. D. 464. But a general notice is now sufficient under the Act of 1884.

(c) *Offen* v. *Harman*, 1 D. F. & J. 253, but there had been a prior parol consent; and see Chance, Pow. 727 to 737; and *A.-G.* v. *Sitwell*, 1 Y. & C. 559; *Wiles* v. *Gresham*, 2 Dr. 258.

(d) *Phillips* v. *Edwards*, 33 B. 440.

(e) *Sykes* v. *Sheard*, 2 D. J. & S. 6. The decision of the Court of Appeal was mainly rested on the difference of opinion entertained by judges, which is no longer a ground for rejecting the title; see *Beveley* v. *Carter*, 4 Ch. 230.

(f) *Clark* v. *Seymour*, 7 Si. 67; *ante*, p. 71.

(g) 16 & 17 V. c. 70, ss. 136, 137; and see *Re T——*, 15 Ch. D. 78.

title may be made with the assent of the bankrupt and his trustee (*h*).

Whether consenting power of tenant for life is affected by alienation, &c.

A question has frequently arisen, as to whether the power of a tenant for life to consent to a sale is affected by the alienation of, or incumbrances upon, his life estate. The general rule of law is, that no one shall derogate from his own grant. If, therefore, the deed of a grantee contain an actual or implied engagement that the alienee or incumbrancer shall enjoy the property *in specie*, the consenting power of the tenant for life cannot be exercised, as against such alienee or incumbrancer, without his concurrence: but if the deed contain an actual or implied recognition of the liability of the property to conversion during the existence of the life estate, then the consenting power of the tenant for life seems to be unaffected in cases of mere equitable powers (*i*). At Law the decisions recognize the continuance of the power in cases where the alienation is partial, or by way of re-settlement, or mortgage, or for some other limited purpose (*k*); but in these cases the power cannot be exercised so as to defeat interests previously created by the donee of the power (*l*). It has been thought (*m*) that an alienation out and out necessarily destroys the power; but this opinion has not met with general approval (*n*); and it seems to be now well settled that the power is not extinguished by an absolute alienation of the life estate, though of course it cannot be exercised to the prejudice of the alienee. Thus, where A., being entitled for life, with an ultimate remainder in default of children to himself in fee,

(*h*) *Holdsworth* v. *Goose*, 29 B. 111; *Essell* v. *Hammersly*, 31 B. 255.

(*i*) See 5 Jarm. Conv. 161 *et seq.*; *Warburton* v. *Farn*, 16 Si. 625; *Morgan* v. *Rutson*, *ib.* 231; and *Lord Leigh* v. *Lord Ashburton*, 11 B. 470 (where the life estate was subject to judgments), and cases cited; *Hurst* v. *Hurst*, 16 B. 372. See special provisions in the Succession Duty Act, 1853, s. 42, as to charges created by the Act not affecting powers of sale, exchange or partition.

(*k*) See Sug. Pow. ch. 3, s. 3, and see, too, *Tyrell* v. *Marsh*, 3 Bing. 31; *Warburton* v. *Farn*, 16 Si. 625; *Hill* v. *Pritchard*, Kay, 394, *Simpson* v. *Bathurst*, 5 Ch. 193; and see *Wright's Trustees* to *Marshall*, 28 Ch. D. 93.

(*l*) *Goodright* v. *Cater*, Doug. 477.

(*m*) See Sug. Pow. 66.

(*n*) See Chance, Pow. 3157 *et seq.*

first sold all his interest in the settled estate to B., and afterwards the trustees of the settlement by his direction sold the same estate to B. in exercise of their power, the second sale was upheld as a valid exercise of the power (*o*).

Not affected by his concurrence as protector.

The consenting power of the tenant for life is not affected by his concurring as protector in a disentailing assurance by the tenant in tail in remainder; although the deed is expressed to be made "to the intent that all estates, powers, rights, and interests limited to take effect after the determination, or in defeazance of the estate tail, should be put an end to, and to limit the estate in fee simple" (*p*).

Inalienable nature of powers of tenant for life under the Settled Land Act.

Under the Settled Land Act the powers of a tenant for life are incapable of assignment or release, and do not pass to a partial or qualified assignee, or to a mortgagee or incumbrancer of his estate; and a contract not to exercise any of these powers is void. But these provisions are to operate without prejudice to the rights of any assignee for value of the estate or interest of the tenant for life (*q*).

Power of sale, when it authorizes a mortgage.

We may here remark that, as a general rule, a power of or trust for sale, out and out, for a purpose or with an object beyond the raising of a particular charge, does not authorize a mortgage; but that where it is for raising a particular charge, and the estate itself is settled or devised subject to that charge, there it may be proper under the circumstances to raise the money by mortgage; which will then be supported as a conditional sale (*r*). On the other hand, a restriction against raising a sum of money by sale of an estate has been held also to preclude a mortgage (*s*); so, too, a lease is, *primâ facie*, not within the scope of a trust for sale (*t*).

(*o*) *Alexander* v. *Mills*, 6 Ch. 124; and see *Hardoon* v. *Williams*, 26 Ch. D. 417, and *Re Cooper*, 27 Ch. D. 565.

(*p*) *Hill* v. *Pickford*, Kay, 594.

(*q*) Sect. 50.

(*r*) See *Stroughill* v. *Anstey*, 1 D. M. & G. 645; *Page* v. *Cooper*, 16 B. 396.

(*s*) *Bennett* v. *Wyndham*, 23 B. 521, *sed qu.*

(*t*) *Lucas* v. *Jackson*, 8 Sim. 217.

Whether a trustee with power to mortgage can give a power of sale.

It has been held that a trustee, who has merely a power to mortgage, cannot give a mortgage of real estate with a power of sale, though he may do so as to chattels (*u*); and it seems only reasonable that a person having in himself no power to sell should be unable to delegate such a power to another. But it has been held that an executor, in mortgaging his testator's leaseholds, may give a power of sale (*x*). So, too, a power given to an executor to mortgage real estate was held to authorize the insertion of a power of sale (*y*); and the tendency of the recent decisions has been to treat a power of sale as a necessary and proper incident of every mortgage. Under Lord Cranworth's Act a power of sale in the statutory form became, unless expressly excluded, an implied part of every mortgage executed after the passing of the Act; and under the Conveyancing Act, 1881 (*z*), a mortgagee, where the mortgage is made by deed, has a statutory power of sale to the like extent as if it had been in terms conferred by the mortgage deed. A power to raise money by sale *or* mortgage authorizes a mortgage with a power of sale (*a*).

Whether power of sale authorizes partition or enfranchisement.

It is now settled (though it was at one time doubted) that a power of sale and exchange authorizes a partition (*b*); and there can be little or no doubt that it authorizes an enfranchisement, which is in fact merely a sale of the freehold to the tenant instead of to a stranger.

Section 3.

(3.) *The price.*

The price. As to the consideration: they must sell for gross sum.

Trustees must sell for a gross sum of money, unless any other consideration be specially authorized: for instance, a sale

(*u*) *Clarke* v. *Royal Panopticon Co.*, 4 Dr. 26.

(*x*) *Russell* v. *Plaice*, 18 B. 21; *Earl Vane* v. *Rogden*, 5 Ch. 663; *Re Chawner's Will*, 8 Eq. 569; and *Cruikshank* v. *Duffin*, 13 Eq. 555, where the mortgage was to a benefit building society; *Ricketts* v. *Lewis*, 20 Ch. D. 745.

(*y*) *Cook* v. *Dawson*, 29 B. 123; but see on app. 3 D. F. & J. 127. See, too, *Leigh* v. *Lloyd*, 2 D. J. & S. 330; *Selby* v. *Cooling*, 23 B. 418; where the mortgage was ordered by the Court.

(*z*) Sect. 19.

(*a*) *Bridges* v. *Longman*, 24 B. 27; *Re Chawner's Will*, 8 Eq. 570.

(*b*) *Re Frith and Osborne*, 3 Ch. D. 618.

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in consideration of a rent charge (c) or annuity is invalid (d); but a mortgagee, selling under a general power of sale, may allow a part of the purchase-money, of course not exceeding the amount due on the security, to remain on mortgage of the estate, provided that he debits himself in account with the mortgagor with the whole price, and the sale and mortgage are distinct transactions (e). Statutory owners under the Land Clauses Consolidation Act were expressly restricted to a sale for a gross sum, except where the vendor was seised in fee (f); under the Amendment Act, the power has been extended to all cases of sale, &c., by persons under disability, and the restriction to a sale for a gross sum has been removed (g).

And may have cost the value I.

Trustees should use all reasonable diligence (h), as if the estate were their own, to obtain a fair price; and, therefore, should ascertain its value, even at the expense of a valuation (i), where circumstances seem to render such a course expedient; but they are not, it is conceived, justified in agreeing to sell, at a price to be fixed by valuation, or in any other manner. The price, whatever means they may take of ascertaining what it ought to be, must eventually be determined by a free exercise of their own judgment. Of course they are not justified in entering into an agreement with an intending purchaser, giving him a future *option* to purchase at a fixed price (k). Although bound to sell by auction, they may, it seems, without special authority, fix a reserved bidding; and, after an ineffectual attempt to sell, buy in at that

(c) *Reid* v. *Shaw*, Sug. Pow. 953.

(d) *Reid* v. *Shergold*, 10 V. 370, 381.

(e) *Darcy* v. *Durant*, 1 D. & J. 535; *Thardow* v. *Mackeson*, L. R. 4 Q. B. 97; *Battyes* v. *Maynard*, 31 W. R. 461.

(f) Sects. 10, 11.

(g) 23 & 24 V. c. 106, ss. 1, 2.

(h) *Ord* v. *Noel*, 5 Mad. 438, 440; and see *Mortlock* v. *Buller*, 10 V. 309; Sug. 61; *Harper* v. *Hayes*, 2 D. F. & J. 512. Under the Settled Land Act (sect. 4), every sale is to be made at the best price that can reasonably be obtained; and see *Wheelwright* v. *Walker*, 23 Ch. D. 753.

(i) See *Campbell* v. *Walker*, 5 V. 680.

(k) *Clay* v. *Rufford*, 5 De G. & S. 768; *Oceanic Steam Navigation Co.*, v. *Sutherberry*, 16 Ch. D. 236.

price (*l*): but if they do so, and there is a delay in the re-sale, they may be held answerable for the loss sustained (*m*). In one case, instead of putting up the property again for sale, liberty was given to the trustee to purchase at the reserved price, when that appeared to be the full value (*n*). A condition, reserving a bidding, although it may, under the circumstances of the case, subject the trustees to liability to their *cestuis que trust*, will bind bidders at the sale (*o*).

Contract by *cestuis que trust*, and assented to by trustee.

In cases where estates are vested in trustees in trust to sell at the request of their *cestuis que trust*, the usual course is, for such *cestuis que trust*, who are the persons most interested in the matter, and who have the strongest motive for obtaining the highest possible price, to enter into a conditional contract of sale, and then to obtain the assent of the trustees; who, when they have satisfied themselves that the sum proposed to be given for it is the value of the property, ought to sanction a sale which is beneficial for the persons for whom they are trustees. And a trustee capriciously refusing to adopt a contract so entered into, has been fixed with the costs of a suit for removing him from the trust (*p*).

Trustee ought to promote competition between rival bidders.

If a trustee offers property for sale by private contract, and there are rival bidders for it, he ought to promote competition between them; but he is under no obligation to recede from his acceptance of an offer, in order to entertain a higher bid. Where a trustee for sale of an estate, not readily saleable by auction, with the consent of all his *cestuis que trust*, offered it to a purchaser at a specified price, and before the offer was unconditionally accepted, received a bid of a similar amount from another person, a sale to the person to whom he had first offered the estate was upheld (*q*).

(*l*) *Re Peyton's Settlement*, 30 B. 252; *Else* v. *Barnard*, 28 B. 228; *Bousfield* v. *Hodges*, 33 B. 90.

(*m*) *Taylor* v. *Tabram*, 6 Sim. 281; *Fry* v. *Fry*, 27 B. 141, where there was no previous attempted sale by auction; *Ex p. Lewis*, 1 Gl. & J. 69.

(*n*) *Turner* v. *Dean*, 32 B. 327.

(*o*) *Ivey* v. *Pendegrass*, 2 B. 115.

(*p*) *Palmer* v. *Carew*, 32 B. 568.

(*q*) *Harper* v. *Hayes*, 2 D. E. & J. 542. Consider this case.

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Fiduciary vendors not responsible for loss on sale by auction.

As a general rule, fiduciary vendors, selling by auction, and using all proper precautions to effect an advantageous sale, incur no responsibility should the estate sell below its value; and Equity will even help the purchaser to his bargain (*r*).

Statutory owners cannot fix price.

Under the Lands C. C. Act, 1845, statutory owners have no power to fix the price; this must be determined either by a jury, or arbitration, or valuation (*s*): it is conceived, however, that a company agreeing with a statutory owner to purchase at a certain price, is bound, if such price be subsequently ascertained, in manner prescribed by the Act, to be a fair value of the land (*t*). Where a satisfactory title cannot be made, the company should go to a jury; and they then get a price fixed which binds the *true* owner, whoever he may be (*u*); unless the person contracting to sell to the company has either no title at all, or a positively bad title (*x*).

Costs of re-investment on sale by trustees to railway companies, &c.

Where real property is settled in the usual way, with a tenancy for life, and a discretionary power of sale in trustees, and a trust for re-investment of the purchase-money in land, it may be a question whether the trustees could safely exercise the power, for the purpose of a sale under the Lands C. C. Act, except under a special stipulation that the company shall bear the costs of re-investing the purchase-money, in the same way as if the sale had been made by the tenant for life, under the statutory power (*y*); or, with such an increase of purchase-money as may be considered an equivalent to the probable amount of such costs.

Sale by equitable tenant for life.

An equitable tenant for life, though he can bind those in remainder, cannot, by the 7th section of the Lands C. C. Act,

(*r*) *Ord* v. *Noel*, 5 Mad. 110.

(*s*) Sect. 9; see *post*, pp. 705 *et seq.*

(*t*) See *Hawkes* v. *Eastern Counties R. Co.*, 5 H. L. C. 331; *Potts* v. *Thames Haven Co.*, 15 Jur. 1004; *Peters* v. *Lewes R. Co.*, 18 Ch. D. 429.

(*u*) Sects. 76, 77; *Douglas* v. *L. & N. W. R. Co.*, 3 K. & J. 173.

(*v*) *Wells* v. *Chelmsford Local Board*, 15 Ch. D. 108.

(*y*) See sect. 80.

1845, make a valid conveyance at law, without the concurrence of the trustees having the legal estate (*z*). On the other hand, trustees for persons who are absolute owners in equity, and are under no disability, are not persons competent to contract for the sale of land under this section (*a*).

under Lands C. C. Act.

By municipal corporations.

Municipal corporations, if not within the Municipal Corporations Act, have *primâ facie* the same powers of alienation as a private individual, though this presumption may be rebutted by showing that they hold their lands upon trusts (*b*); but under the Lands C. C. Act, 1845, no municipal corporation can sell land required by the promoters for extraordinary purposes, except with the consent of the Treasury (*c*); the signature of the Secretary of the Commissioners to a letter of consent is sufficient (*d*); but no consent can be given in respect of land not specified in the memorial (*e*).

Committees of lunatics.

Committees of lunatics ought not to exercise statutory powers of sale without the consent of the Chancellor (*f*).

Sale by a mortgagee who makes a gift of the price.

Where a mortgagee in possession agreed to sell a portion of the land as a site for a hospital, and to give the price to the charity, so as, in effect, to make a free gift of the land, it was held that the sale could not be supported, although the price had been ascertained by valuation, and the mortgagee debited himself with it in his account with the mortgagor (*g*). In such a case, it is to the vendor's interest to lower the price as much as possible.

(*z*) *Lippincott* v. *Smyth*, 29 L. J. Ch. 520.

(*a*) *Peters* v. *Lewes R. Co.*, 16 Ch. D. 703; 18 Ch. D. 429.

(*b*) *Ewan* v. *Corporation of Avon*, 29 B. 144; and see now the Municipal Corporation Act, 1882, 45 & 46 V. c. 50, ss. 108, 128; and Rawlinson.

(*c*) Sect. 15.

(*d*) *Arnold* v. *Mayor of Gravesend*, 25 L. J. Ch. 776.

(*e*) *Ibid.*

(*f*) *Re Wade*, 1 H. & Tw. 202; *Re Taylor*, *ib.* 432; and see 16 & 17 V. c. 70, ss. 124, 125, 136, 137; and see *Re Brewer*, 1 Ch. D. 109, as to the release of an annuity charged on land.

(*g*) *Darcy* v. *Darrant*, 1 D. & J. 535.

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As to general points relating to sales by fiduciary vendors.

Fiduciary vendors: their general liability; as to covenants, and costs.

(4.) *As to general points relating to sales by fiduciary vendors.*

As a general rule, fiduciary vendors must show a marketable title—that is, a title which at all times and under all circumstances may be forced on an unwilling purchaser (*h*)—and are in all respects liable to a purchaser as if they were absolute and beneficial owners (*i*); except that they ordinarily enter into no covenants for title beside the covenant against incumbrances (*k*): and their liability extends to costs in a suit for specific performance (*l*): they have, however, a general right, except in cases of neglect (*m*) or misbehaviour, to recover such costs from the estate of their beneficiaries.

Sale by solvent or surviving partner on bankruptcy or death of co-partner.

If one of two partners become bankrupt, the solvent partner, in winding up the affairs of the partnership, has a right to sell the partnership property to pay the partnership debts (*n*). But this power is an authority personal to him in his capacity of partner, which he may exercise in that capacity, but cannot transfer to another (*o*). So, on the death of a partner, in the absence of any special provision to the contrary in the articles, the surviving partner seems to be able to sell, and to make a good title to the real estate of the firm.

Trustee of legal estate must convey to trustees for sale of equitable estate.

Where an equitable fee is conveyed to trustees for sale, the trustee of the outstanding legal estate must convey it to them without requiring the concurrence of their *cestuis que trust*: but if he do more than merely so convey, he will be responsible for any breach of trust which he may thus facilitate (*p*).

(*h*) See *Pyke* v. *Waddingham*, 10 Ha. 8, and see comments on this case in *Mullings* v. *Trinder*, 10 Eq. 419; *Hamilton* v. *Buckmaster*, 3 Eq. 323.

(*i*) Sug. 69; *White* v. *Folyambe*, 11 V. 343; *McDonald* v. *Hanson*, 12 V. 277.

(*k*) *Worley* v. *Frampton*, 5 Ha. 560; *post*, pp. 146, 622; and 44 & 45 V. c. 41, s. 7 (7).

(*l*) *Edwards* v. *Harvey*, G. Coop. 40; *Hill* v. *Magan*, 2 Moll. 460.

(*m*) See *Pears* v. *Corley*, 15 B. 209.

(*n*) *Fox* v. *Hanbury*, Cowp. 445.

(*o*) *Fraser* v. *Kershaw*, 2 K. & J. 501.

(*p*) *Angier* v. *Stannard*, 3 M. & K. 566, 567.

Sale by trustees, rarely restrained by injunction.

It is only upon strong grounds, and where irreparable injury is likely to be sustained by the parties interested, or a clear breach of trust is about to be committed, that the Court will, by injunction, stop an intended sale by fiduciary vendors (*q*).

Liability of person assuming to act as trustee.

We may here remark, that if a person, either rightfully or wrongfully, assume to act as a trustee for sale, and in that character sign a receipt for purchase-money, he will be answerable for it, whether he himself receive it, or allow it to be received by a stranger (*r*).

Mortgagee holding surplus purchase-money.

A mortgagee selling under a power of sale, and retaining the surplus purchase-money unproductive in consequence only of disputes between subsequent incumbrancers, is not chargeable with interest on such surplus (*s*). The safest course to adopt in such a case would be to pay the money into Court under the Trustees Relief Act. And a mortgagee, who sells with notice of subsequent incumbrances, is liable to the later mortgagees if he allows the surplus purchase-money to get into the hands of the mortgagor (*t*).

Trustees selling doubtful claims.

Although trustees for sale can seldom be advised, unless specially authorized, to run the risk of so doing, they will generally be allowed in their accounts any sums which, in the exercise of a *bonâ fide* discretion, and acting under competent advice, they may have paid in order to effect a sale: as *e.g.* in satisfaction of a doubtful claim (*u*).

Trustee cannot make a professional

A trustee for sale, being a solicitor, or even one of several trustees professionally employed by his co-trustees (*x*), cannot,

(*q*) See *Ex p. Montgomery*, 1 Gl. & J. 338; *Marshall* v. *Sladden*, 7 Ha. 428; *Kerhaw* v. *Kalon*, 1 Jur. N. S. 974; *Dance* v. *Goldingham*, 8 Ch. 902.

(*r*) *Rackham* v. *Siddall*, 1 M. & G. 607; *Pearce* v. *Pearce*, 22 B. 248; *Hennessy* v. *Bray*, 33 B. 96.

(*s*) *Mathison* v. *Clark*, 4 W. R. 30.

(*t*) *West London Bank* v. *Reliance Society*, 27 Ch. D. 187.

(*u*) *Forshaw* v. *Higginson*, 8 D. M. & G. 827.

(*x*) *Broughton* v. *Broughton*, 5 D. M. & G. 160; but see the exception to this general rule established by *Craddock* v. *Piper*, 1 M. & G. 664; *Re Barber*, 34 Ch. D. 77; *Re Corsellis*, *ibid.* 675.

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profit out of the sale.

nor can the firm of which he is a partner, unless expressly authorized by the trust instrument, charge his *cestuis que trust* with any costs other than costs out of pocket: and the same rule applies as against auctioneers (*b*); and a mortgagee is considered for this purpose to be a trustee for the mortgagor within the stringency of the rule (*c*). But an auctioneer or a broker, who is a mortgagee, may, it seems, deduct his commission if he sells under the direction of the Court (*d*). A trustee may, before he accepts the trust, stipulate for a remuneration for his services: but there must be no undue pressure on his part, and any bargain of this sort is discouraged by the Court (*e*).

Section 5.

As to purchases by trustees.

They can so invest only under special authority.

(5.) *As to purchases by trustees.*

Trustees are not justified in investing trust money in the purchase of real estate, unless specially authorized so to do by the instrument creating the trust (*f*): nor will the Court compel them to exercise a mere discretionary power of so investing (*g*): but, where the power is so worded as to be equivalent to a trust to invest upon a specified request being made, they are bound to act upon it, although the result may be—as in the case of a purchase of leaseholds—to benefit the requisitionist at the expense of other *cestuis que trust* (*h*), and although the trustees so purchasing are bound, as between themselves and the vendor, to enter into the ordinary covenants to pay the rent and perform the covenants in the lease. Of course trustees empowered to invest in the purchase of real estate could not, as a general rule (*i*), safely

(*b*) *Douglas* v. *Archbutt*, 2 D. & J. 148.

(*c*) *Matthison* v. *Clarke*, 3 Dr. 3; *Kirkman* v. *Booth*, 11 B. 273.

(*d*) *Arnold* v. *Garner*, 2 Ph. 231.

(*e*) Lewin, 631.

(*f*) *Earl of Winchelsea* v. *Norcliff*, 1 Vern. 434.

(*g*) *Lee* v. *Young*, 2 Y. & C. C. C. 532; *Gisborne* v. *Gisborne*, 2 Ap. Ca. 300; *Marquis Camden* v. *Murray*, 16 Ch. D. 161; *Tempest* v. *Lord Camoys*, 21 Ch. D. 571. As to the investment of capital moneys arising under the Settled Land Act, see sect. 21.

(*h*) *Beauclerk* v. *Ashburnham*, 8 B. 322; *Cadogan* v. *Lord Essex*, 2 Dr. 227.

(*i*) But see, as to renewable Irish leaseholds, *Macleod* v. *Annesley*, 16

buy leaseholds, unless the power expressly authorized this particular mode of investment. It may not be useless to remark that the 4 & 5 Will. IV. c. 29, authorizing investments in Ireland under trusts to invest in England, &c., and Lord St. Leonards' Act, 22 & 23 Vict. c. 35, authorizing a trustee, unless expressly forbidden, to invest any trust fund on real securities in any part of the United Kingdom (*j*), apply only to investments by way of security, and do not extend to purchases.

What investments authorized by a trust to purchase.

Whether a trust to invest in the purchase of lands, to be settled to the same uses as the settled estates, authorizes an expenditure upon substantial improvements, is extremely doubtful (*k*). Now, trustees, who are in possession, are empowered by the Improvement of Land Act, 1864 (*l*), to apply for and carry out, in accordance with the provisions of the Act, the several improvements mentioned in the 9th section, such as drainage, irrigation, planting, and the like.

Improvement of Land Act, 1864.

Capital money under the Settled Land Act.

Capital money arising under the Settled Land Act is to be invested as prescribed by sect. 21, or in improvements as defined by sect. 25. And where money is in the hands of trustees under a settlement, and is liable to be laid out in the purchase of land to be made subject to the settlement, it may, at the option of the tenant for life, be invested or applied as capital money arising under the Act (*m*). And this provision has been extended to a case not strictly within the section, on the principle that as the tenant for life could by a sale of the

B. 600; as to the powers of corporations or trustees holding funds in trust for any public or charitable purpose to invest on real security, see now 33 & 34 V. c. 34.

(*j*) Sect. 32. Note the provision in this Act, that it shall not extend to Scotland, and see *Re Mair's Will*, 27 B. 579.

(*k*) *Dunn* v. *Dunn*, 7 D. M. & G. 207; *Dent* v. *Dent*, 30 B. 363; *Re Newman's S. E.*, 9 Ch. 681; *Drake* v. *Trefusis*, 10 Ch. 364; *Re Speer's Trusts*, 3 Ch. D. 262; *Donaldson* v. *Donaldson*, 3 Ch. D. 743; *Re Aldred's Est.*, 21 Ch. D. 228; and see *post*, pp. 751 *et seq.*

(*l*) 27 & 28 V. c. 114, s. 21, extended by sect. 36 of, and in part repealed by, the Settled Land Act.

(*m*) Sect. 33.

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land purchased bring the proceeds within the Act, the formality of a purchase may be dispensed with (*n*).

Time for investment.

Where trustees under a will are directed to invest in the purchase of land "with all convenient speed," twelve months from the testator's death will be deemed, as between the parties beneficially interested, a reasonable time within which to make the investment (*o*): but, as between the trustee and his *cestuis que trust*, the former, unless imperatively required so to do by the terms of the trust, is not bound to make, and would not be justified in making, the purchase until a favourable opportunity occur.

Devise of estate A conditionally on purchase of estate B.

Where a testator devised estate A, conditionally upon his executors buying and "completing the purchase of" estate B (which in that event was to go along with A) within a specified period, but in case the executors "should not be able" within that time to purchase B, then estate A was to go in another specified direction, and the executors, although "able" neglected to purchase B within the specified period, it was held that A descended to the heir-at-law as undisposed of; and that the remedy (if any) of the devisees was against the executors personally (*p*).

Bonâ fide exercise of discretion not interfered with.

Where trustees are empowered to choose between several specified modes of investment, the Court will not interfere with a *bonâ fide* exercise of their discretion, upon the ground that the result may be to vary the relative rights of their *cestuis que trust* (*q*).

Apportionment of dividend on

Where stock is sold for the purpose of investing the produce in land, the tenant for life has been held to be entitled

(*n*) *Re Mackenzie's Trusts*, 23 Ch. D. 750.

(*o*) *Parry* v. *Warrington*, 6 Mad. 155.

(*p*) *Upjohn* v. *Upjohn*, 7 B. 59; the two properties above referred to as A and B were in fact undivided moieties of one estate.

(*q*) See *Minet* v. *Leman*, 7 D. M. & G. 340, 351.

to an allowance in the nature of an apportionment of the current half-year's dividend (r).

stock sold out.

Directions of trust instrument to be followed.

In exercising the power or trust, any special directions in the trust instrument as to the peculiar mode or nature of the investment must of course be strictly followed.

How far bound to require a marketable title.

As a general rule, trustees for investment could not, unless specially authorized so to do, safely buy subject to special conditions restrictive of a purchaser's *primâ facie* right to a marketable title or the usual evidence of title; nor accept a title not strictly marketable (s); but this must be understood merely as a rule for the general guidance of trustees, and it does not follow that a trustee purchasing a substantially safe holding, but not strictly marketable title, is necessarily guilty of a breach of trust. In fact, such purchases are constantly sanctioned by the Court (t), whenever special circumstances exist which render the acquisition of the specific property a matter of importance to the trust. If, for instance, there is an estate already in settlement, and small adjacent or neighbouring property, which has been or is likely to become a nuisance, comes into the market, the Court will generally sanction the purchase of such a property under a title very far from marketable. So, too, in buying a large estate the Court does not reject a property, desirable as a whole, merely because some inconsiderable portions, not essential from local position or other causes to the due enjoyment of the residue,

(r) *Lord Loudesborough* v. *Somerville*, 19 B. 295; but cf. *Schofield* v. *Redfern*, 2 Dr. & S. 173; *Freeman* v. *Whitbread*, 1 Eq. 266; *Re Ingram's Trusts*, 11 W. R. 980.

(s) See now 37 & 38 V. c. 78, s. 1, substituting 40 years for 60 years as a sufficient root of title. See also sects. 2 and 3 as to the power of trustees to purchase without excluding the application of the rules prescribed by the Act.

(t) *Re Sheffield & R. R. Co.*, 1 S. & G., Appendix iv.; and see *Ex p. Lane*, 19 L. T. O. S. 310. In *Ex p. The Trustees of Hindley New Chapel*, V.-C. K., 29th June, 1855, the Court, in directing an inquiry as to title, directed, that "in making such inquiry, E. M., of &c., shall be considered to have been seised for an estate in fee simple of the said plot of land at the date of his will and at the time of his death," which death occurred in 1820; but see *Meyrick* v. *Lewis*, 34 B. 58.

are held under short or otherwise objectionable titles. On the other hand, the want of a safe-holding title to a very minute acreage may be a reason for rejecting the purchase of a large estate. The greater the importance of the specific land to the rest of the property, the greater is the reason for buying it with almost any title if the rest of the estate is already in settlement; and the greater is the reason for rejecting the purchase *in toto* if the entire property is proposed to be taken. Trustees who have done of their own discretion that which the Court, if applied to, would itself have sanctioned, would, no doubt, be protected; but considering the exigencies of modern practice it seems desirable, in preparing wills and settlements, to give trustees for investment an express discretionary power to buy with less than a marketable title. It may, however, be observed that, except under special circumstances, such as those above referred to, even such a power could not be acted on with perfect safety, and that the tendency of recent decisions and the recent practice of the Court, is towards an increased rather than a diminished particularity in investigating titles

CHAPTER III.

Chapter III.

THE RELATIVE DUTIES OF VENDORS AND PURCHASERS PRIOR TO THE SALE.

1. *As to disclosure or concealment of defects, incumbrances, &c. by vendor.*

2. *As to commendatory and other similar statements by vendor.*

3. *As to disclosure or concealment of advantages by purchaser.*

4. *As to depreciatory remarks or conduct by purchaser.*

Preliminary negotiations, rules to be observed in.

We may next advert to some general rules as to the relative duties of intending vendors and purchasers before entering into an agreement for sale: they relate to—

1st. The disclosure or concealment of defects, incumbrances, &c. by a vendor:

2ndly. Commendatory and other similar statements by a vendor:

3rdly. The disclosure or concealment of advantages by a purchaser:

4thly. Depreciatory remarks or conduct by a purchaser.

Section 1.

As to disclosure or concealment of defects, incumbrances, &c., by vendor.

(1.) *As to the disclosure or concealment of defects, incumbrances, &c. by a vendor.*

Defects in an estate may be either *patent*,—that is, such as may be discovered by ordinary vigilance on the part of a purchaser; *e.g.*, the existence of an open footpath over the

Vendor need

Chap. III. Sect. 1.

not point out *patent* defect.

property (*a*), or the ruinous state of buildings (*b*); or *latent*,—that is, such as the greatest attention (*c*) would not enable him to discover; *e.g.*, the existence of defects in a ship's bottom when sold afloat (*d*): it is held that a vendor is not bound to point out *patent* defects (*e*).

But must not conceal or divert attention from it.

But he must not, either during a treaty for, or while intending a sale, endeavour to conceal a defect, or to divert a purchaser's attention from it: in neither case, if proved, can he enforce the agreement in Equity (*f*): and in the first (as where a vendor, about to sell a house, purposely plastered and papered over a defect in the main wall (*g*),) the purchaser may recover his deposit at Law: and this, although the estate be sold "with all faults" (*h*): and where there was a contract for a lease of "a newly-built house," to contain covenants on the part of the lessee to repair, and the lessee entered into possession, and shortly afterwards discovered that the house was defectively built, specific performance was not enforced against him; partly because some of the defects were latent, and partly because, in every contract of this sort, there is an implied undertaking on the part of the lessor to deliver the house in complete tenantable repair (*i*). Of course, if the defects are patent, and the purchaser, having notice of them, takes possession, he cannot resist the vendor's suit for specific performance (*k*). So, where there was an agreement to rent a furnished house, which, from defective drainage, was unfit for habitation at the time fixed for the commencement of the tenancy, the tenant was allowed to rescind the contract, on the ground that in such a letting there is an implied undertaking that the house shall be fit for occupation at the time at which the tenancy is to begin (*l*).

Latent defects.

(*a*) *Oldfield* v. *Round*, 5 V. 508.

(*b*) *Grant* v. *Munt*, G. Coop. 177; *Keates* v. *Earl Cadogan*, 10 C. B. 591.

(*c*) Sug. 333.

(*d*) See *Mellish* v. *Motteux*, Peake N. P. 156.

(*e*) Sug. 2.

(*f*) Sug. 2; see *Shirley* v. *Stratton*, 1 Br. C. C. 440; *Small* v. *Attwood*, You. 490.

(*g*) See *Pickering* v. *Dowson*, 4 Taun. 785.

(*h*) *Schneider* v. *Heath*, 3 Camp. 506; *Bagshole* v. *Walters*, *ib.* 156.

(*i*) *Tildesley* v. *Clarkson*, 30 B. 419. But see *Oxford* v. *Provand*, L. R. 2 P. C. 141, *et quære*.

(*k*) *Cook* v. *Waugh*, 2 Gif. 201.

(*l*) *Wilson* v. *Finch-Hatton*, 2 Ex. D. 336; and see *Smith* v. *Marrable*,

Case of vendor selling by agent and not communicating to him material defect.

But at Law, where the plaintiff, knowing that a nuisance existed which rendered his house unfit for a residence, employed an agent to dispose of it, without mentioning to him the nuisance, and the agent, upon being asked by the intended lessee whether there were any objection to the house, replied that there was not; a majority of the Court held, that this was no defence to an action for breach of the agreement to take the house (*m*); inasmuch as the plaintiff made no false representation, and the agent, although he made one, did not know it to be false. But this decision, from which Lord Abinger at the time dissented, can no longer be regarded as an authority (*n*). In a later case in the House of Lords, one of the Law Lords laid it down that if a vendor, aware of a serious nuisance affecting his property, entrusts the sale to an agent who is ignorant of it, and who, on being asked by a purchaser, innocently denies its existence, the contract ought to be avoided (*o*).

Of vendor not disclosing *latent* defects.

In a suit for specific performance, the decision in *Cornfoot* v. *Fowke* would doubtless have been in favour of the lessee; and, in fact, a vendor cannot, although the estate be sold subject to all faults (*p*), rely on the aid of a Court of Equity, if he omit to disclose a *latent* defect which the purchaser has no means of ascertaining (*q*): although the rule at Law would seem to have been otherwise, in the absence of fraud, if the sale be "with all faults" (*r*): and it has been held in an action upon the contract, that the representation of the agent, if made in the ordinary course of business (*s*),

11 M. & W. 5. But there is no such implied undertaking on the letting of an unfurnished house; *Keats* v. *Earl Cadogan*, 10 C. B. 591; *Chester* v. *Powell*, 52 L. T. 722.

(*m*) *Cornfoot* v. *Fowke*, 6 M. & W. 358.

(*n*) See *Wilson* v. *Fuller*, 3 Q. B. 68; *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259, 262; notes to *Pasley* v. *Freeman*, 2 Sm. L. C.

(*o*) *National Exchange Co.* v. *Drew*, 2 Macq. 108, 115; *Mullens* v. *Miller*, 22 Ch. D. 194; and see the subject fully discussed in *Ladgater* v. *Tow*, 44 L. T. 691.

(*p*) Sug. 2.

(*q*) See *Lucas* v. *James*, 7 Ha. 410; *Tildesley* v. *Clarkson*, 30 B. 419.

(*r*) See *Baghlah* v. *Walters*, 3 Camp. 154, 156; *Early* v. *Garrett*, 9 B. & C. 929; *Pickering* v. *Dowson*, 4 Taun. 779; *Freeman* v. *Baker*, 5 B. & Ad. 797; *Taylor* v. *Bullen*, 5 Ex. 779.

(*s*) See *Coleman* v. *Riches*, 24 L. J. C. P. 125. See also *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259;

is the representation of the principal; but in an action on the case for deceit, the misrepresentation or concealment must be proved against the principal (*t*); but the principal is answerable for a misrepresentation made in the course of his business and for the principal's benefit (*tt*), and if he knowingly refer the purchaser to an ignorant agent (*u*), or knowingly allow him to remain under a delusion as to a material fact which there is a duty to disclose (*x*)—for there may be a silence which is as eloquent as words (*y*)—this will be equivalent to misrepresentation. In a recent case at Law (*z*), it was held that the passive acquiescence of the seller in the self-deception of the buyer did not entitle the latter to avoid the contract; and it was laid down by one of the judges, that a vendor is under no legal obligation to inform the purchaser that he is under a mistake, not induced by the act of the vendor (*a*). But these dicta, however applicable to the particular case, seem to be too wide as a general statement of the law. Many cases may be put in which mere passive acquiescence by a vendor in the self-deception of the purchaser, may render him as liable in Equity to have the contract rescinded as if the mistake were originally due to his own contrivance; nor does it seem material, so far as the principle on which the relief is granted is concerned, that the purchaser might, with reasonable care or inquiry, have disabused his mind of the false impression; though the want of proper caution may be evidence to show

Brownlie v. *Campbell*, 5 Ap. Ca. 925; *Mullens* v. *Miller*, 22 Ch. D. 194. As to the authority of the secretary of a company to make representations, see *Newlands* v. *Nat. Employers' Assoc.*, 54 L. J. C. L. 428; *Barnett* v. *South London Tramways Co.*, 18 Q. B. D. 815.

(*t*) Per Lord Campbell, *Wilde* v. *Gibson*, 1 H. L. C. 615.

(*tt*) See *Brit. Mutual Banking Co.* v. *Charnwood R. Co.*, 18 Q. B. D. 714, 717.

(*u*) *Wilson* v. *Fuller*, 3 Q. B. 75.

(*x*) See *Hill* v. *Gray*, 1 Stark. 434; *Keates* v. *Earl Cadogan*, 10 C. B. 591.

(*y*) *Brownlie* v. *Campbell*, 5 Ap. Ca. 925, 950.

(*z*) *Smith* v. *Hughes*, L. R. 6 Q. B. 597.

(*a*) *Ib.* 607. As to the distinction which has been drawn between the concealment of extrinsic circumstances affecting the value of the subject-matter of sale, or operating as an inducement to a contract, and the concealment of intrinsic circumstances appertaining to its nature, character and condition, see Story on Contracts, sects. 517 *et seq.*; and see on the doctrine, Fry, 302, *n.*

that the vendor was not under the belief that the purchaser was deceived.

Recent valuation, &c. need not be disclosed.

But a vendor is not bound, even in Equity, to state that the property has been recently valued at a sum greatly less than the intended purchase-money; or that the tenant has complained of the rent as being excessive (*b*); or on the sale or lease of a mine, that he has himself worked it, but has abandoned the working as unprofitable, where the intending purchaser or lessee has had the opportunity of examination (*c*).

As to matters of title.

As to incumbrances and defects in title:—A vendor, so far as his *primâ facie* liability in this respect is not negatived or restricted by the terms of the contract, must produce to the purchaser all such documents of title in his possession (*d*) or power as are necessary, in order to deduce a marketable title for the usual or stipulated period; and must inform him of all material facts not apparent thereon (*e*). Whether a purchaser, where a good sixty—or now forty—years' title (*f*) is shown, can, as a matter of right, unless precluded by condition, claim to inspect earlier title deeds than the contracted, is doubtful; but the better opinion seems to be, that as they clearly constitute a part of the title, he is entitled to inspect them, though probably at his own expense (*g*). The vendor, however, need not direct attention to defects, &c. apparent on the title deeds (*h*), nor to any matter of which the purchaser has actual or implied notice; for instance, upon the sale of leaseholds (*i*), the stringent or unusual character of the covenants need not be mentioned, as notice of the lease is notice of its contents. Thus, where property was described merely as held by the vendor as assignee of a lease, the purchaser

On sale of leaseholds.

(*b*) *Abbott* v. *Sworder*, 4 De G. & S. 448, 460.

(*c*) *Haywood* v. *Cope*, 25 B. 140; *Jeffreys* v. *Tairs*, 4 Ch. D. 448.

(*d*) 1 Jarm. Conv. 63.

(*e*) *Edwards* v. *M'Leay*, G. Coop. 312; and see *Gibson* v. *D'Este*, 2 Y. & C. C. C. 542; Sug. 246.

(*f*) See now 37 & 38 V. c. 78, s. 1.

(*g*) *Parr* v. *Lovegrove*, 4 Dr. 170; and see Sug. 407.

(*h*) Sug. 6.

(*i*) *Hall* v. *Smith*, 14 V. 426; *Pope* v. *Garland*, 4 Y. & C. 394; *Walter* v. *Maunde*, 1 J. & W. 181; *Smith* v. *Capron*, 7 Ha. 189; *Vignolles* v. *Bowen*, 12 Ir. Eq. R. 194; *Lewis* v. *Bond*, 18 B. 85; *Wilbraham* v. *Livesey*, 18 B. 206, 209. See there the distinction between an agreement to sell and an agreement to underlet.

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was precluded from objecting to the title on the ground that the lease contained restrictive covenants (*k*). The notice, however, must be explicit; and a condition that no requisition shall be made in respect of a specified underlease, or any other underlease prior to a certain date, has been held not to preclude a requisition in respect of such a prior underlease, which was within the vendor's knowledge, but not specifically noticed in the contract (*l*): but a reasonable opportunity of inspection should be allowed the purchaser (*m*).

Misrepresentation not allowed.

And there must, of course, be no misrepresentation (*n*) upon the subject, or any artifice to divert attention: and if the vendor be informed by the purchaser of his object in buying, and the lease contain covenants which will defeat that object, mere silence will in Equity be equivalent to misrepresentation (*o*); unless, indeed, the purchaser enters into the contract after having actually examined the lease (*p*). But even misrepresentation, if unintentional, will not give the purchaser a right of action, after conveyance, if the sale be "with all faults" (*q*); and the purchaser may, even although the case be one of fraud, waive his remedy by continuing, after discovering the fraud, to deal with the property as owner (*r*). But it must be borne in mind generally that though there may, in a particular case, not be enough to induce the Court to rescind a contract, there may still be quite enough to prevent the Court from enforcing it (*s*).

Lease, how far notice.

And it may be doubted whether the above rule as to notice

(*k*) *Grosvenor* v. *Green*, 5 Jur. N. S. 117.

(*l*) *Edwards* v. *Wickham*, 1 Eq. 68; *Re Banister*, 12 Ch. D. at p. 141; *Redgrave* v. *Hurd*, 20 Ch. D. see p. 14; *Re Marsh and Earl Granville*, 24 Ch. D. 11, 17.

(*m*) *Brumfit* v. *Morton*, 3 Jur. N. S. 1198; and see *Hyde* v. *Warden*, 3 Ex. D. 72, 80; *Cosser* v. *Collinge*, 3 M. & K. 283; *Bank of Ireland* v. *Brookfield Linen Co.*, 15 L. R. Ir. 37.

(*n*) See *Van* v. *Corpe*, 3 M. & K. 269, 277; and the judgment in *Pope* v. *Garland*, 1 Y. & C. 101, 402, and cases cited, and see *Boskomb* v. *Phillips*, 6 Jur. N. S. 363, *Re Banister*, 12 Ch. D. 131, *Re Marsh and Earl Granville*, 24 Ch. D. 11.

(*o*) *Flight* v. *Barton*, 3 M. & K. 282; and cases cited *suprà*, p. 104.

(*p*) *Morley* v. *Clavering*, 29 B. 84.

(*q*) *Early* v. *Garrett*, 9 B. & C. 928.

(*r*) *Campbell* v. *Fleming*, 1 A. & E. 40.

(*s*) *Re Banister*, *suprà*.

in the case of a lease (general as are the terms in which it is laid down (*t*)) would, if the question arose in a suit for specific performance, be held to apply so as to affect the purchaser with notice of any matter in a lease which is not in its nature incidental to such an instrument (*u*): whether, for instance, such implied notice, although extending to unusual covenants on the sale of the term, would also extend to a clause of pre-emption contained in a lease, upon the sale of the reversion (*x*); or would extend to fix him with notice of collateral facts, affecting the title and stated in such covenants (*y*).

What facts are material to title.

It is conceived, that upon the purchase of an estate in possession, those facts only are so far *material* as to render their disclosure obligatory upon the vendor, which affect his power to give to the purchaser that which he has contracted for; and that, if he buy subject to a known risk, circumstances which increase the mere amount of risk need not, in general, be stated: for instance, it has been held that the grantor of a personal annuity, or his agents, although bound to give honest answers to all relevant questions put by the intended grantee, need not voluntarily disclose the fact of his being already under large pecuniary liabilities (*z*); for it may be presumed that a person, who is obliged to raise money by granting annuities, is more or less involved: but where the consideration for the annuity is a *reversionary* interest belonging to the purchaser, the grantor is bound, in Equity, to communicate to the purchaser the unhealthy state of the proposed *cestui que vie* (*a*).

On purchase of reversion.

(*t*) See Sug. 7.

(*u*) See *Jones* v. *Rimmer*, 14 Ch. D. 588.

(*x*) In *Martin* v. *Cotter*, 3 J. & L. 507, Sugden, C., intimates an opinion that the doctrine as to a lease being notice has been carried too far, and see *Nelthorpe* v. *Holgate*, 1 Coll. 203; and *Hight* v. *Barton*, 3 M. & K. 282; but in *Vignolles* v. *Bowen*, 12 Ir. Eq. R. 194, a power in the lease for the tenant to cut timber was held to fall within the rule, see 197, and *Vaughan* v. *Magill*, *ib.* 207. And see further as to how far notice of a lease is notice of its contents as between vendor and purchaser, *post*, pp. 869, 980, and *Caballero* v. *Henty*, 9 Ch. 447; *Patman* v. *Harland*, 17 Ch. D. 353.

(*y*) *Darlington* v. *Hamilton*, Kay, 550.

(*z*) *Adamson* v. *Lutt*, 2 R. & M. 72.

(*a*) *Davies* v. *Cooper*, 5 M. & C. 270.

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Delusive reference to covenants.

So, if a vendor describe the property as let upon lease under certain specified covenants, beneficial to the reversion, but which he knows could not be enforced, this would probably be considered delusive (*b*); so, if he say that there are no unusual covenants, when in fact there are (*c*).

The mere preparation of an annuity deed by the grantor's solicitor does not place him in any confidential relation towards the grantee, even although no other solicitor be employed in the transaction (*d*).

Misrepresentation by vendor's solicitor.

A solicitor, however, is liable to the purchaser, who has been induced by his misrepresentation to purchase his client's estate with a defective title (*e*).

His liability under 22 & 23 V. c. 35.

And now (*f*), any seller or mortgagor, or his solicitor or agent, who conceals any settlement, deed, will, or other instrument material to the title, or any incumbrance from the purchaser (*g*), or who falsifies any pedigree, on which the title does or may depend, in order to induce him to accept the title, with intent to defraud, is guilty of misdemeanour, and also liable to an action for damages, at the suit of the purchaser or mortgagee; but no prosecution is to be commenced without the sanction of the Attorney-General, or, if that office be vacant, of the Solicitor-General.

Inquiry should be made of

We may also, in connection with the above head, observe, that a purchaser suspecting that a third person has a claim on

(*b*) *Flint* v. *Woodin*, 9 Ha. 621.

(*c*) *Andrew* v. *Aitken*, 22 Ch. D. 218.

(*d*) *Adamson* v. *Evitt*, 2 R. & M. 72.

(*e*) Sug. 6; *Arnot* v. *Biscoe*, 1 V. sen. 96; and see *Evans* v. *Bicknell*, 6 V. 193; *Bowles* v. *Stuart*, 1 Sch. & L. 227; *Craig* v. *Watson*, 8 B. 427; but see also *Tylee* v. *Webb*, 14 B. 14, 16. See, in connection herewith, *Whitmore* v. *Mackeson*, 16 B. 126.

(*f*) 22 & 23 V. c. 35, s. 24. See *Re Ford and Hill*, 10 Ch. D. 365, 370.

(*g*) The word "mortgagee" is inadvertently omitted in the statute; see now 23 & 24 V. c. 38, s. 8. As to whether the concealment of an incumbrance prior to the stipulated commencement of title is within the Act, see *Smith* v. *Robinson*, 13 Ch. D. 148, 151.

the estate, should (*h*), in the presence of witnesses (who may take notes of what passes) (*i*), inquire of him whether such be the fact, and the amount of the claim; at the same time stating his own intention to purchase (*k*): and if such person deny the existence of the claim, or assert that it is confined to a special sum, he will be bound by his denial or assertion (*l*): but, although bound to answer truly, if at all, a mortgagee, it would appear, may decline to answer, unless the intending purchaser offer to redeem him (*m*). But it has been more recently held, that where property cannot be obtained, without a particular person saying whether he claims it or not, it is not sufficient that he should hold his tongue, but he must state expressly whether he claims or not (*n*).

Supposed adverse claimant.

So, if the interest contracted for be merely equitable, the purchaser should inquire of the trustees in whom it is vested whether there are any and what incumbrances; and, on completion, should give them notice of the sale; and where an interest held under a derivative trust is purchased, the inquiry and notice should be made of, and given to, the trustees of the original trust, if the property remains under their control (*o*); and, though not absolutely necessary, it is desirable that in every case the notice should be formal (*p*). Such inquiry and notice are advisable for the sake as well of avoiding litigation with future, as of discovering the existence of present, incumbrancers; but on the purchase of an equitable estate in land, no priority is obtained thereby (*q*).

Inquiry and notice on purchase of equitable estate.

Priority.

The trustees will be liable in Equity if they give false

Trustee liable

(*h*) Sug. 7; *Ibbotson* v. *Rhodes*, 2 Vern. 554.

(*i*) *Doe* v. *Perkins*, 3 T. R. 719; *Burrough* v. *Martin*, 2 Camp. 112; *Wood* v. *Cooper*, 1 C. & K. 645.

(*k*) 2 Vern. 554.

(*l*) *Pearson* v. *Morgan*, 2 Br. C. C. 388; and see *Evans* v. *Bicknell*, 6 V. 183, and *Ex p. Carr*, 3 V. & B. 111.

(*m*) See *Bugden* v. *Bignold*, 2 Y. & C. C. C. 390.

(*n*) *R. Primrose*, 23 B. 590, where the stranger was visited with costs.

(*o*) *Bridge* v. *Brandon*, 3 Eq. 661. See *Lee* v. *Houlett*, 2 K. & J. 531.

(*p*) *Lloyd* v. *Banks*, 3 Ch. 488, overruling in effect *Re Brown's Trusts*, 5 Eq. 88.

(*q*) *Vide post*, p. 943.

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for false information.

information, either fraudulently, or merely through forgetfulness (*r*).

Purchase of a legacy or fund in Court.

In every case the purchaser of a legacy should inquire whether it is free from all claims and demands in respect of the testator's estate (*s*); and, where the fund is in Court, the assignee should obtain a stop order, but this will not give him priority over an incumbrancer, who has already given notice of his charge to the trustees (*t*). The mortgagee of an undivided share of a fund in Court, who has obtained a stop order on the fund, has priority over a subsequent incumbrancer who obtains a stop order over the share, after it has been carried over to a separate account (*u*).

Section 2.

(2.) *As to commendatory and other similar statements by a vendor.*

As to commendatory statements by vendor. Vendor not bound by mere puff.

It may be laid down, as a general rule, that mere expressions of praise or affirmations of value, such as, that an estate, sold as a renewable leasehold, is "nearly equal to freehold" (*x*); that land, in fact imperfectly watered, is "uncommonly rich water-meadow land" (*y*); or that a house of mean character is "a desirable residence for a family of distinction" (*z*); will not, however objectionable they may be in point of morality, render the contract voidable by the purchaser; although their tendency would doubtless be to indispose the Court to enforce specific performance at the suit of the vendor. Thus, where the lessor of a quarry stated that the limestone in it was "fit for the London market" (an expression restricted in the trade for lime of the best quality), and it was in fact of a very inferior descrip-

(*r*) *Burrows* v. *Lock*, 10 V. 170. See, too, *Slim* v. *Croucher*, 1 D. F. & J. 518; *Barry* v. *Crosby*, 2 J. & H. 1; *Brownlie* v. *Campbell*, 5 Ap. Ca. 935.

(*s*) *Noble* v. *Brett*, 21 B. 499.

(*t*) *Livesy* v. *Harding*, 23 B. 141; *Day* v. *Day*, 1 D. & J. 144. See and consider *Dearle* v. *Hall*, 3 Russ. 1.

(*u*) *Lister* v. *Tidd*, 4 Eq. 462.

(*x*) *Fenton* v. *Browne*, 14 V. 144.

(*y*) *Scott* v. *Hanson*, 1 Si. 13, *sed quare*.

(*z*) *Mayennis* v. *Fallon*, 2 Moll. 587.

tion, it was held that this, though a mere puffing statement on his part, was a bar to a decree for specific performance (a). So, an untrue statement by a vendor (though made in ignorance), that the house which he was selling was not damp, was held fatal in Equity (b), and a false statement, that "the property is now held by a very desirable tenant at a rent of 400*l.*," was held sufficient ground for rescission (c). But in each of these cases there was an actual mis-statement of facts: so also there was in the "water-meadow" case, the decision in which would probably not now be followed.

Unless amounting to mis-statement of facts,

And the rule, perhaps, extends to any statement by a vendor, which is equivalent to a mere expression of his own opinion, and does not amount to an assertion of an independent and ascertainable fact; such as, a statement on the sale of an advowson, that an avoidance is "likely to occur soon" (d); or on the sale of renewable leaseholds, that the fine payable is "small" (e): if a purchaser choose to rely on the vendor's opinion as to what is a small fine, or a probability of speedy avoidance, he does so at his peril.

which the purchaser does not know to be untrue.

So, where the purchaser is aware that the vendor's laudatory statements are in fact untrue, and yet enters into the contract, the maxim "*caveat emptor*" applies: as where property was described as standing on "a fine vein of anthracite coal," and it was within the purchaser's knowledge that it had been worked, and was almost exhausted (f).

Effect in Equity of mis-statement as to life being healthy and insurable.

But, in Equity, where on the sale of a life interest, the particulars described the tenant for life as a very healthy gentleman aged forty-eight, whose life was insurable, and an insurance was guaranteed at five guineas *per cent.*, and

(a) *Higgins* v. *Simels*, 2 J. & H. 460. See this case as to the narrow boundary which separates a puffing speculative statement from misrepresentation; and see further as to misrepresentation, *post*, pp. 898 *et seq.*

(b) *Strangways* v. *Bishop*, 29 L. T. O. S. 120.

(c) *Smith* v. *Land Property Co.*, 28 Ch. D. 7.

(d) *Trower* v. *Newcome*, 3 Mer. 704.

(e) *Lenton* v. *Browne*, 14 V. 144.

(f) *Colby* v. *Gadsden*, 34 B. 416.

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it turned out that the vendors had recently insured the life at a rate less than five guineas *per cent.*, but exceeding the rate usually charged on healthy lives, their bill for specific performance was dismissed with costs, although the purchaser admitted that he knew five guineas to be more than the usual premium (*g*).

As to covenants.

So, on a sale of property on lease, a reference to the existence of covenants beneficial to the reversion, but which, to the vendor's knowledge, cannot be enforced, would probably be held to be deceptive (*h*); or a false statement that there are no unusual covenants (*i*). So, on a sale of a reversion in property, subject to an annuity, a condition that a recital in a former deed which stated that the annuity—described merely as "a life annuity"—had not been claimed for twenty-one years, should be evidence of its having determined, whereas, in fact, the annuity was for four lives, and was charged merely on the reversion, and was therefore not claimable during the period referred to, was held to be unfair, and void (*k*). And it may be laid down, generally, that if there is anything in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser, and that if he fails to do so specific performance will not be decreed (*l*).

As to cesser of charge.

Valuation of estate by surveyor.

And a false statement, by a vendor, of an independent fact—as, that the property has been valued by a surveyor at a specified sum—will, if relied on by the purchaser (*m*), enable him to avoid the contract at Law and in Equity (*n*);

(*g*) *Brealey* v. *Collins*, You. 317.

(*h*) *Flint* v. *Woodin*, 9 Ha. 621.

(*i*) *Andrew* v. *Aitken*, 22 Ch. D 218.

(*k*) *Drysdale* v. *Mace*, 5 D. M. & G. 103.

(*l*) See *Jones* v. *Rammer*, 14 Ch. D. 588.

(*m*) See *Clapham* v. *Shillito*, 7 B. 146; and cf. *Roots* v. *Snelling*, 48 L. T. 216.

(*n*) *Burton* v. *Lister*, 3 Atk. 386; *Small* v. *Attwood*, You. 407, *Attwood* v. *Small*, 6 C. & F. 232, *Partridge* v. *Usborne*, 5 Russ. 195; Sug. 1; *Lord Brooke* v. *Roundthwaite*, 5 Ha. 298; *Pike* v. *Vigers*, 2 D. & Wal. 1, 150; *Redgrave* v. *Hurd*, 20 Ch. D. 1, and see particularly the observations of Jessel, M. R., on *Attwood* v. *Small*.

Offer for purchase by third person.

and might, perhaps, sustain an action for damages (o): but a vendor is not liable to such action for the false assertion that a third person has offered a specified sum for the estate (p). His statement, however, that he "will guarantee" a specified income to arise from the property, although not amounting to a contract, would, it appears, if made fraudulently, support an action for the *tort* (q).

The two former of the three cases last referred to seem to be distinguishable; for a purchaser might naturally consider the opinion of a surveyor to indicate something like the market value of the property, although he might be supposed to attach little importance to the bare offer by an individual, possibly made hastily, and soon repented of: though, certainly, in the cited case, the purchaser seems to have been directly influenced by the mis-statement: and such a mis-statement would probably be a defence to an action for specific performance.

Vendor when liable at Law.

And a false statement that a specified rent is paid for the premises (r), has been held to subject the vendor to an action at Law, although the purchaser did not rely on his statement, but made inquiries of other persons; who, it is presumed, also deceived him. Nor, in a case of fraud, is the action necessarily barred by the fact of his having paid the purchase-money in an action for specific performance (s).

Stranger when liable for mis-statement.

And the same liability is incurred by a stranger, who, even from mere wantonness, intending to deceive, although without any view to gain, makes a false representation to a purchaser as to the value or rent of the property: nor is it material that the sale is by auction instead of by private

(o) *Powell* v. *Edmunds*, 12 East, 6.

(p) Sug. 2; 1 Rolle's Abr. 101, pl. 16.

(q) *Gerhard* v. *Bates*, 2 E. & B. 476.

(r) *Ingsley* v. *Selby*, Raym. 1118; see *Dobell* v. *Stevens*, 3 B. & C. 623; *Watson* v. *Fuller*, 3 Q. B. 68.

(s) *Jendwine* v. *Slade*, 2 Esp. 573.

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contract (*t*). Lord St. Leonards says (*u*), citing Sir W. Grant, "In cases of this nature it will be sufficient to show, 1st, that the fact as represented is false; 2ndly, that the person making the representation had knowledge of a fact contrary to it" (*x*). The rule is more broadly laid down by Mansfield, C. J., who says, that "it signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if in point of fact it turns out to be false" (*y*): and the better opinion seems to be, that, in order to sustain an action for deceit, it is sufficient to show *actual fraud;* consisting in either an assertion (with or without motive) of what the party knows to be false (*z*), or a communication, for a deceitful or fraudulent purpose, of that which is in fact false, and which, although he may not know it to be false, he represents himself as knowing to be true (*a*).

There must be actual fraud; *semble.*

And it has been held at Law, that where a man, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time (*b*). And in Equity, where a stranger has by such a fraudulent misrepresentation induced a party to enter into the contract, the Court will compel him to make good his misrepresentation to the best of

Must in Equity make good his misrepresentation.

(*t*) *Bardell* v. *Spinks*, 2 C. & K. 646.

(*u*) Sug. 4.

(*x*) *Burrowes* v. *Lock*, 10 V. 476; *Lake* v. *Bratton*, 8 D. M. & G. 410.

(*y*) *Schneider* v. *Heath*, 3 Camp. 506; and see *Nedle* v. *Wilkinson*, 1 Br. C. C. 516; *Exp. Carr*, 3 V. & B. 111, and *Pearson* v. *Morgan*, 2 Br. C. C. 388.

(*z*) See Lord Campbell's judgment in *Wilde* v. *Gibson*, 1 H. L. C. 633, and cases *infrà*, n. (*a*); *Watson* v. *Poulson*, 15 Jur. 1111.

(*a*) See *Adamson* v. *Jarvis*, 4 Bing. 66; *Pasley* v. *Freeman*, 3 T. R. 51; and 2 Sm. L. C.; *Gascoigne's case*, cited Dougl. 632; *Powell* v. *Edmunds*, 12 East. 6, 11; *Foster* v. *Charles*, 6 Bing. 396; *Corbett* v. *Brown*, 8 Bing. 33; *Polhill* v. *Walter*, 3 B. & Ad. 114; *Shrewsbury* v. *Blount*, 2 Man. & G. 475; *Freeman* v. *Cooke*, 6 D. & L. 187; *Taylor* v. *Ashton*, 11 M. & W. 401; *Evans* v. *Edmonds*, 13 C. B. 786; *Milne* v. *Marwood*, 15 C. B. 781.

(*b*) *Pickard* v. *Sears*, 6 A. & E. 469, 474. See, too, *Shepherd* v. *Gillespie*, 5 Eq. 293.

his ability (*c*): and conduct which is calculated to induce a false belief as to the actual facts, may, if relied on, amount to a fraudulent misrepresentation, even though there may have been no intention to deceive; as *e.g.* where, on full information being required, documents which are known to be insufficient, are furnished as containing it (*d*). A suit in Equity, in the nature of an action for misrepresentation, is analogous to the Common Law action for deceit, and is governed by the same principles (*e*); "mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or purchase of shares, forms no ground for an action in the nature of an action for misrepresentation. There must be some active mis-statement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false" (*f*). But it would probably now be held that this statement of the law requires qualification, and that where there is a duty to make disclosure, as in the instance above given, and a man in breach of that duty remains silent, with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, he is liable to an action of deceit (*g*).

Guarantee of solvency must be in writing.

A representation that a man is able to answer an obligation is not binding unless in writing (*h*).

(*c*) *Pulsford* v. *Richards*, 17 B. 95.

(*d*) *Coaybeare* v. *New Brunswick, &c. R. Co.*, 1 D. F. & J. 578; *New Brunswick, &c. R. Co.* v. *Muggeridge*, 1 Dr. & S. 363, which see as to what concealment or ambiguity will amount to misrepresentation.

(*e*) *Peek* v. *Gurney*, L. R. 6 H. L. p. 390.

(*f*) Per Lord Cairns in *Peek* v. *Gurney*, *ubi supra*, p. 403; and see *Redgrave* v. *Hurd*, 20 Ch. D. 1, 13; *Smith* v. *Chadwick*, 20 Ch. D. 27; 9 App. Ca. 187.

(*g*) *Bennett* v. *Campbell*, 5 App. Ca. 925, 950.

(*h*) 9 Geo. IV. c. 14, s. 6; see *Haslock* v. *Fergusson*, 7 A. & E. 86; *Swann* v. *Phillips*, 8 A. & E. 457; *Devaux* v. *Steinkeller*, 6 Bing. N. C. 84 (representations of the credit of a firm, by a partner); and see *Semple* v. *Pink*, 1 Ex. 74; and see now 19 & 20 V. c. 97, s. 3.

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Rescinding contract in Equity.

Where either of the parties to the contract has procured the other to enter into it by means of a material misrepresentation or such a concealment of a material fact as is considered in Equity equivalent to a misrepresentation (*i*), the Court will not merely decline to enforce, but will even rescind, the contract (*k*), unless, it seems, the party defrauded elect to have the misrepresentation made good (*l*): and, in a suit by a purchaser, will direct his deposit to be returned, and declare a lien for it on the property (*m*): but it cannot award damages by way of compensation to the plaintiff under its general jurisdiction (*n*): nor does Lord Cairns' Act, 21 & 22 Vict. c. 27, apply to a case where the suit is not for the specific performance, but for the rescission, of the contract; and since the Judicature Act, although the Courts have power to administer all kinds of relief (*o*), it is plain that there is no substantive right to damages, where, as in the present case, there was none before the Acts.

Change of circumstances between offer and acceptance.

Where an offer to purchase has been made to the knowledge of the vendor on the faith of circumstances connected with the property, and these circumstances change between the making of the offer and its acceptance by the vendor, it is conceived that the vendor is bound to disclose the fact and nature of the change, and that if he accept the offer without

(*i*) As to what is sufficient to evoke the interference of the Court, see *Torrance* v. *Bolton*, 8 Ch. 118; see p. 124, where Lord Justice James lays it down that the Court will interfere "where it is unconscientious for a person to avail himself of the legal advantages which he has obtained" by his misrepresentation or concealment.

(*k*) See *Turner* v. *Harvey*, Jac. 169; *Edwards* v. *McLean*, G. Coop. 308; *Berry* v. *Armstrong*, 2 Ke. 221; *Lovell* v. *Hicks*, 2 Y. & C. 46; *Stainbank* v. *Fernley*, 9 Si. 556; *Attwood* v. *Small*, 6 C. & F. 232, 395, 444; *Wilde* v. *Gibson*, 1 H. L. C. 605, 635; *Reynell* v. *Sprye*, 1 D. M. & G. 660; *Tulsford* v. *Richards*, 17 B. 95; *Jennings* v. *Broughton*, 5 D. M. & G. 126; *Bartlett* v. *Salmon*, 6 D. M. & G. 33; *Coulthart* v. *New Brunswick R. Co.*, 1 D. F. & J. 578; *New Brunswick, &c. R. Co.* v. *Muggeridge*, 1 Dr. & S. 363; *Torrance* v. *Bolton*, 8 Ch. 118; *Stanley* v. *McGuinn*, 11 L. R. Ir. 514.

(*l*) *Rawlins* v. *Wickham*, 3 D. & J. 304.

(*m*) *Torrance* v. *Bolton*, 8 Ch. 118.

(*n*) *Gentle* v. *Stone*, 11 V. 128; *Sutherland* v. *Jones*, 5 M. & C. 1.

(*o*) See *Monroe* v. *Mew*, 29 Ch. D. 725.

doing so, specific performance will be refused, or the contract rescinded (*p*).

How voidable contract may be set up.

A voidable contract may be set up by a subsequent confirmation, or even by mere waiver or abandonment of the right to rescind it (*q*); but the confirmation must be clear, amounting, in fact, to a new contract by reference to the terms of the original contract, when such original contract is tainted with actual fraud (*r*). But in the absence of fraud, the Court will not entertain a suit for the delivery and cancellation of the contract, except perhaps in cases where to allow it to remain in the defendant's possession might prejudice the plaintiff's title (*s*).

Vendor's liability for obtaining money on false pretences.

If the vendor procure payment of a deposit from the purchaser, by means of a false and fraudulent representation as to the state of the property, he may, it seems, be convicted of obtaining money by false pretences (*t*).

Misrepresentation by a public company.

The same rules as to false or deceptive statements, which are applicable to a contract between individuals, have an equal application to a contract between an individual and a public company. If a person has been induced to take shares in a company by means of a fraud, which is in point of law the fraud of the company, he may repudiate the shares as between himself and the company, though as regards creditors he will still, under the present system of winding up, be liable to be placed on the list of contributories (*u*). The right, however,

(*p*) See *Tindall* v. *Bowd*, 4 D. J. & S. 318; *Dent* v. *London and Provincial Marine Insurance Co.*, 8 Ch. D. 469; *Re Scottish Lithium Co.*, 23 Ch. D. 113.

(*q*) See *Cole* v. *Gibbons*, 3 P. W. 290; *Chesterfield* v. *Janson*, 2 Ves. sen. 125; *Moss* v. *Royal*, 12 Ves. 355, *Roche* v. *O'Brien*, 1 B. & B. 355; *Campbell* v. *Fleming*, 1 A. & E. 10; *Attwood* v. *Small*, 6 C. & F. 421, 132; *Flint* v. *Woodin*, 9 Ha. 618.

(*r*) *De Montmorency* v. *Devereux*, 7 C. & F. 225, 239, *ante*, pp. 55, 56.

(*s*) *Oliver* v. *Cox*, 2 H. & M. 351; and see the V.-C.'s remarks on *Gordon* v. *Sly*, 11 V. 128; but see contra, *Pierce* v. *Corough Co.* v. *Indurabh*, 22 L. T. 279.

(*t*) *Reg.* v. *Langan*, 2 Jur. N. S. 596, case of mortgagee; *Reg.* v. *Rudnal*, *ib.* 597.

(*u*) *Central R. Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 99; *Re River Rover Mining Co.*, 2 Ch. 501, 509; *Ross* v. *Estates Investment Co.*, 3 Ch.

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to be relieved of shares on the ground of misrepresentation in the prospectus, stands on a different footing from the right to rescind an ordinary contract. The shareholder who seeks to be discharged must have done two things: he must have repudiated his contract, and have got his name off the register of shareholders, subject to the qualification that if he has, before the commencement of the winding up, taken proceedings to have his name removed, this will be sufficient. The explanation of this rule would seem to be, that in the case of a shareholder, the legislature has created, as it were, a statutory status (*x*).

Innocent misrepresentation binds in Equity.

And in Equity a misrepresentation, although made in perfect good faith, if made in order to induce others to act upon it, or under circumstances in which the party making it may reasonably suppose that it will be acted on, *primâ facie* binds the party making it, as between himself and those whom he has thus misled (*y*).

Section 3.

As to concealment, &c., by purchaser. He need not disclose concealed advantages.

(3.) *As to concealment and disclosure of advantages by the purchaser.*

A purchaser need not disclose any fact, unknown to the vendor, which increases the value of the property itself; *e.g.*, the existence of a mine (*z*); or the existence of negotiations for an advantageous sale of part of a mortgaged estate, supposed to be a short security, upon the purchase by the first mortgagee of a previous charge for less than its nominal value (*a*). Where, however, the owners of a colliery entered into a contract with an adjoining landowner for the purchase of his estate without disclosing the fact, of which he was

682; *Re Estates Investment Co., McNull's case*, 10 Eq. 503.

(*x*) *Re Scottish Petroleum Co.*, 23 Ch. D. 413.

(*y*) *West* v. *Jones*, 1 Si. N. S. 205, 208; *A.-G.* v. *Stephens*, 1 K. & J. 748; *Peek* v. *Gurney*, L. R. 6 H. L. p. 412.

(*z*) *Fox* v. *Mackreth*, 2 Br. C. C. 420; *Turner* v. *Harvey*, Jac. 178; see and consider our Lord's parable of the treasure hid in a field, Matt. xiii. 44.

(*a*) *Dolman* v. *Nokes*, 22 B. 402.

ignorant, that they had without authority got a considerable quantity of coal from under it, the Court, in a suit by the purchasers, refused to enforce the contract, although there was no proof of undervalue; and, in a suit by the landowner, held that he was entitled to the value of the coals got from under his land (*b*); and the case was attempted to be distinguished from those which we have just been considering on this ground, viz., that where a person, having committed a serious trespass on his neighbour's land, proposes to buy it so as to screen himself from the consequence of his own wrongful act, the proposal which he makes is not a simple proposal for the purchase of the property, but involves a buying up of rights which the owner has acquired against him, and of which the owner is not aware (*c*); but whether the distinction rests on any solid ground seems doubtful.

But must not mislead vendor.

But anything, even a mere word, which tends to mislead the vendor upon such a point, will deprive the purchaser of the assistance of a Court of Equity (*d*); and would, it is conceived, be a fraud, avoiding the contract at Law, at the election of the vendor.

Summary of duties of purchaser as to disclosure, &c.

The duties of a purchaser in this connection may be summed up in the words of Lord Selborne (*e*): "Every purchaser is bound to observe good faith in all that he says or does, with a view to the contract, and of course to abstain from all deceit, whether by suppression of truth or suggestion of falsehood. But inasmuch as a purchaser is, generally speaking, under no antecedent obligation to communicate to his vendor facts which may influence his own conduct or judgment, when bargaining for his own interest, no deceit can be implied from his mere silence as to such facts, unless he undertakes or professes to communicate them. This, however, he may be held to do, if he makes some other communication which, without the addition of these facts, would be

(*b*) *Phillips* v. *Homfray*, 6 Ch. 770.

(*c*) See Lord Hatherley's judgment, p. 779.

(*d*) *Turner* v. *Harvey*, Jac. 178; and see *Davis* v. *London Marine Ins. Co.*, 8 Ch. D. 475.

(*e*) *Coaks* v. *Boswell*, 11 Ap. Ca. 232, 235.

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necessarily or naturally and probably misleading. If it is a just conclusion that he did this intentionally, and with a view to mislead in any material point, that is fraud; and it is sufficient ground for setting aside a contract, if the vendor was in fact so misled. A man is presumed to intend the necessary or natural consequences of his own words and acts; and the *evidentia rei* would therefore be sufficient without other proof of intention. If the vendor was not in fact misled, the contract could not be set aside; because a *dolus* which neither induced nor materially affected the contract is not enough."

Section 4.

(4.) *As to depreciatory remarks, &c., by the purchaser.*

As to depreciatory remarks, &c., by purchaser.

Their effect in Equity;

A purchaser who has misrepresented the property to a third person desirous of purchasing it, cannot enforce the contract in Equity (*f*): so, at Law, when a purchaser, by his statements in the sale room, prevented others from bidding, the sale was held voidable by the vendor (*g*).

and at Law.

A purchaser, however, is not liable to an action at Law for having depreciated to the vendor the value of the property, or its chance of sale (*h*); nor will an action lie against a stranger for preventing a sale by giving notice of his claim upon the estate, unless it be shown that such notice was given maliciously (*i*): and, in any case, in order to support an action for slander of title, the plaintiff must prove *falsehood, malice, and special damage* (*k*). If the defendant acted *bonâ fide*, the action cannot be maintained, although a man of sound sense and a knowledge of business would not have

Slander of title by stranger.

(*f*) *Howard* v. *Hopkyns*, 2 Atk. 371; *Burton* v. *Lister*, 3 Atk. 383, 386.

(*g*) *Fuller* v. *Abrahams*, 3 Br. & B. 116; and see *Mason* v. *Armitage*, 13 V. 38.

(*h*) *Vernon* v. *Keys*, 12 Ea. 632, 638.

(*i*) See *Hargrave* v. *Le Breton*, 4 Burr. 2422; *Malachy* v. *Soper*, 3 Bing. N. C. 371, 382; *Blackham* v. *Pugh*, 2 C. B. 611, 620, 624; *Pater* v. *Baker*, 3 C. B. 831, 862, 868; Sug. 357.

(*k*) *Brook* v. *Raul*, 4 Ex. 521; see *Bignell* v. *Buzzard*, 3 H. & N. 217.

uttered the slander (*l*). And it may be laid down that where a person claims a right which he intends to enforce against a purchaser, not only is he entitled, but he is in common fairness bound, to give prompt notice of his intention: and, consequently, that no action will lie for giving such preliminary warning, unless it can be shown, either that the threat was made *malâ fide*, only with the intent to injure the vendor, and without any purpose to follow it up, or that the circumstances were such as to make the bringing of an action altogether wrongful (*m*). And it is of course not necessary that such a warning should be followed up by bringing an action.

Agreement with, not to bid against, legal.

It appears that an agreement between two persons, not to bid against each other at an auction, is legal; and forms a valuable consideration for an agreement giving to the party withdrawing his opposition at the auction a right of pre-emption over other property (*n*); and such an agreement has been held valid, where the sale was made by order of the Court (*o*).

Effect of written agreement on preliminary negotiations.

It may be remarked, that, when a written agreement between the parties has once been signed all previous representations, unless fraudulent (*p*), become immaterial (*q*), except for the purpose of defence in Equity (*r*), or of rebutting a defence, and so maintaining the written contract.

(*l*) *Pitt* v. *Donovan*, 1 M. & S. 639.

(*m*) *Wren* v. *Weild*, L. R. 4 Q. B. 730; *Halsey* v. *Brotherhood*, 15 Ch. D. 514.

(*n*) *Galton* v. *Emuss*, 1 Coll. 243.

(*o*) *Re Carew's Estate*, 26 B. 187.

(*p*) *Suprà*, sect. 1.

(*q*) *Pickering* v. *Dowson*, 4 Taunt. 779, 783; *Knight* v. *Barker*, 16 M. & W. 69, 70.

(*r*) *Haynes* v. *Hare*, 1 H. Bl. 664. And see *Woodham* v. *Hearn*, 2 Wh. & T. L. C.

Chapter IV.

CHAPTER IV.

AS TO PARTICULARS AND CONDITIONS OF SALE.

1. *General matters relating to particulars and conditions, and their construction.*

2. *Preparation and contents of particulars.*

3. *As to conditions.*

4. *As to what special conditions are generally requisite in various specified cases.*

5. *General remarks on special conditions.*

Section 1.

Doubtful particulars, conditions, and contracts construed strictly against vendor.

(1.) PARTICULARS and conditions of sale, if intended to exclude the purchaser from that to which he would otherwise be entitled, must be expressed in terms most clear and unambiguous (*a*); if there be any chance of reasonable doubt or misapprehension as to their meaning, the construction will be in his favour (*b*). And the same principle of construction, as regards questions of title, applies as well to private contracts for sale and purchase, settled on behalf of both parties, as to ordinary conditions for sale by auction, which, of course, are settled exclusively on behalf of the vendor (*c*).

But not so as to contravene rule of law or universal custom.

But general expressions may not, it seems, be so read by a purchaser as to make them contravene a well known rule of law, or universal custom, if they be capable of bearing a modified meaning; as where the particulars stated that the fines of a manor about to be sold were arbitrary, it was, in

(*a*) *Symons* v. *James*, 1 Y. & C. C. C. 490.

(*b*) *S. C.; Taylor* v. *Martindale*, *ib.* 661; *Seaton* v. *Mapp*, 2 Coll. 562; *Nouaille* v. *Flight*, 7 B 521; *Brumfit* v. *Morton*, 3 Jur. N. S. 1198; *Swaisland* v. *Dearsley*, 29 B. 430, *Re Marsh and Earl Granville*, 24 Ch. D. 11.

(*c*) *Rhodes* v. *Ibbetson*, 4 D. M. & G. 787, *Bulkeley* v. *Hope*, 1 K. & J. 482, and see as to vague conditions, *Taylor* v. *Gilbertson*, 2 Dr. 391, *Cruse* v. *Nouell*, 2 Jur. N. S. 536.

the opinions of Lords Campbell and Brougham, no misdescription, when it was shown that (the fines on alienation being arbitrary) those on the admission of a widow to freebench were certain; inasmuch as such latter fines *never are* arbitrary (*d*).

And may bind purchaser whose attention is directed to their objectionable character.

And conditions such as would not, under ordinary circumstances, be enforced in Equity, may bind a purchaser if his attention be drawn to their objectionable nature before he buys; as where, upon a sale under catching conditions as to title, he inquired, "whether a good and marketable title could be made?" and the auctioneer and vendor's solicitor refused to insert any such statement in the contract, but said that a good title could be made *under the existing conditions*, the purchaser was held to his bargain (*e*).

Vendor's undertakings in, strictly construed.

Any undertaking on the part of the vendor will, it is conceived, as a general rule, be construed strictly in favour of the purchaser; in fact, where, in an agreement for a twenty-one years' lease of a house in Highbury Place, it was stipulated, that there should be a "covenant by lessor for quiet enjoyment by the tenant, and not to let any of the land near Highbury Place for the purpose of making and burning bricks," it was held by V.-C. Wigram, that the lessor must show his title to bind the adjoining land by such a covenant during the proposed term; although it appeared, on the face of the agreement, that the lease was to be granted under a power contained in a will (*f*): but this decision was reversed by Lord Cottenham (*g*).

Cannot be affected by verbal declarations:

As a general rule, the particulars and conditions cannot be contradicted, explained, or added to, by any verbal declarations at the time of sale (*h*): evidence of such declarations

(*d*) *White* v. *Cuddon*, 8 C. & F., see pp 786 and 796.

(*e*) *Hyde* v. *Dallaway*, 4 B 606; and see *Heywood* v. *Mallalieu*, 25 Ch. D. 357.

(*f*) *Dawes* v. *Betts*, 12 Jur. 412.

(*g*) *S. C.*, 12 Jur. 709.

(*h*) *Anson* v. *Tougood*, 1 J. & W. 639, Sug. 15; *Higginson* v. *Clowes*, 15 V. 521; and see *Manser* v. *Back*,

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Except for purpose of defence in Equity.

is inadmissible at Law on behalf of either plaintiff or defendant (*i*), and in Equity on behalf of the plaintiff; even although the defendant (the purchaser) has agreed to abide by the conditions and declarations at the sale (*k*); but in Equity such evidence is admissible for the purposes of defence (*l*).

Case of sub-purchaser.

And the same rules apply between the original purchaser at a sale, and his sub-purchaser (*m*).

Verbal declarations at sale.

When the auctioneer has, at the sale, made verbal declarations at variance with the particulars, &c., a purchaser would seem to be under this disadvantage: viz., that if the Court were clearly satisfied that he heard and understood the effect of the verbal declarations, he probably would not obtain a decree for specific performance *without* the variations, supposing them to be to his prejudice (*n*); nor, on the other hand, could he enforce specific performance *with* the variations, supposing them to be in his favour; a purchaser buying under such circumstances should have the requisite alterations made in the printed particulars or conditions before the agreement is signed by himself and the vendor: although, in cases where the vendor is selling under a power or trust, this might occasionally give rise to questions with the parties beneficially interested.

Should be reduced into writing.

6 Ha. 443; *Goss* v. *Lord Nugent*, 5 B. & Ad. 58.

(*i*) See *Gunnis* v. *Erhart*, 1 H. Bl. 289, *Greaves* v. *Ashlin*, 3 Camp 426; *Ford* v. *Yates*, 2 Man. & G. 549; *Eden* v. *Blake*, 13 M. & W. 614, 617; *Powell* v. *Edmunds*, 12 Ea. 6; *Brett* v. *Clowser*, 5 C. P. D. 376, 385. See *post*, Ch. XVII. s. 4, as to the admission of such evidence to explain ambiguity.

(*k*) *Higginson* v. *Clowes*, 15 V. 521; *Jenkinson* v. *Pepys*, cited 15 V. 521; *Clowes* v. *Higginson*, 1 V. & B. 524. But see *Swaisland* v. *Dearsley*, 29 B. 430, where evidence of these declarations appears to have been improperly admitted on behalf of the *plaintiff*.

(*l*) *Swaisland* v. *Dearsley*, 29 B. 430. And see the notes to *Woollam* v. *Hearn*, 2 Wh. & T. L. C.

(*m*) *Shelton* v. *Livius*, 2 C. & J. 411.

(*n*) *Gunnis* v. *Erhart*, *supra*. See *Pember* v. *Mathers*, 1 Br. C. C. 52; *post*, p. 1149; *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Woodward* v. *Miller*, 2 Coll. 279; Sug. 16; *Farebrother* v. *Gibson*, 1 D. & J. 602; and cf. *Cato* v. *Thompson*, 9 Q. B. D. 616.

Particular information to purchaser, &c., a defence in Equity.

But any particular personal information given to the purchaser, as to incumbrances, or the title, or even declarations on such points by the auctioneer, may be given in evidence by vendor or purchaser as a defence in a suit for specific performance according to the particulars, &c.; but, as a general rule, do not seem to be admissible on behalf of the plaintiff (*o*). In one case (*p*), where the vendor expressly agreed to deduce a good marketable title, and the property (freehold) was subject to restrictive covenants which made the title unmarketable, he was not allowed, by way of defence to an action for the return of the deposit, to rely on the fact (which was proved) that the purchaser, when he entered into the contract, knew of the defect of the title; and it seems to have been considered that evidence of such fact was not admissible. But if the contract is silent as to the title which is to be shown by the vendor, and the purchaser's right to a good title is merely implied by law, the legal implication may be rebutted by showing that the purchaser had notice before the contract that the vendor could not give a good title (*q*). In this case there is no contradiction of the plain terms of a written instrument by parol evidence.

Alteration of copies, and unaltered copy signed.

Where an alteration was made in the printed particulars, and the altered copies were first produced in the auction-room on the morning of sale, and the auctioneer, having read and sold by an altered copy, inadvertently signed agreements indorsed on unaltered copies, it was held, that a purchaser could not enforce specific performance according to the particulars as originally published; although it did not appear that he had heard the auctioneer read the altered copy, or had any knowledge of the alteration (*r*).

(*o*) *Higginson* v. *Clowes*, 15 V. 523; *Clowes* v. *Higginson*, 1 V. & B. 524. And see the notes to *Woollam* v. *Hearn*, 2 Wh. & T. L. C.; and *Heywood* v. *Mallalieu*, 25 Ch. D. 357, 365; cf. *Farebrother* v. *Gibson*, 1 D. & J. 602; and the explanation of this case by Jessel, M. R., in *Cato* v. *Thompson*, 9 Q. B. D. 616.

(*p*) *Cato* v. *Thompson*, 9 Q. B. D. 616; and see *post*, p. 1203 *et seq.*

(*q*) Per Fry, J., in *Gloag and Miller's Contract*, 23 Ch. D. 321, 327.

(*r*) *Manser* v. *Back*, 6 Ha. 443.

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Sale "without reserve,"

In Equity:

At Law.

The Sale of Land by Auction Act, 1867 (s), has made it unlawful, in every case where a sale is stated to be without reserve, for the vendor to employ a person to bid at the sale, or for the auctioneer to take knowingly any bidding from such person. Prior to this enactment if the sale was stated to be made "without reserve," the employment of a bidder to protect the estate (t), or any private arrangement equivalent to a reserved bidding (u), would have vitiated the sale in Equity: but it was generally considered that where the sale was not expressly made "without reserve," a single bidder was allowable in Equity to prevent a sale at an undervalue. But in *Mortimer* v. *Bell* (x), the validity of this practice, and the authority on which it was supposed to rest, were both questioned. At Law, after a considerable fluctuation of the authorities, the doctrine was carried still further than in Equity; and in the absence of a stipulation, expressly reserving the right, the employment of a single puffer would have vitiated the sale (y). The statute has put an end to this conflict between the rules of Law and Equity; and has provided that the particulars or conditions of sale by auction of any *land* shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved (z). The omission of such a statement from the particulars or conditions is not provided for, but it is conceived that in such a case the sale would be treated as without reserve.

The provisions of the Act, it will be observed, are expressed in the alternative; but it seems that on the same sale, not only may a reserved price be fixed, but a right of bidding

(s) 30 & 31 V. c. 48.

(t) *Meadows* v. *Tanner*, 5 Mad. 34, assuming, of course, that the bidder acts.

(u) *Robinson* v. *Wall*, 2 Ph. 372.

(x) 1 Ch. 10, 14, 16, and *vide post*, Ch. V. s. 5.

(y) See *Thornett* v. *Haines*, 15 M. & W. 371, 372, and *Mortimer* v. *Bell*, *supra*, where Lord Cranworth treats the rule as well settled; and *vide post*, Ch. V. s. 5, and cases there cited; and 30 & 31 V. c. 48, s. 4.

(z) 30 & 31 V. c. 48, s. 5, and see as to "land" the interpretation clause.

may be also reserved (*a*). Where, however, the sale is made "subject to a reserved bidding," a person cannot be employed to bid up to the reserved price, unless the right to do so is expressly stipulated for (*b*). And the stipulation must be strictly adhered to; thus, where a right was reserved by the vendor to bid once by himself or his agent, and the auctioneer bid three times with the sanction of the vendor, it was held that the stipulation had been exceeded, and that the sale was voidable at the option of the purchaser (*c*).

Rights of stranger—how bound.

A person not a party, but consenting to the sale, may be bound by statements in the conditions or particulars derogating from his rights over other property (*d*).

Section 2.

(2.) *As to the preparation and contents of the particulars.*

Particulars. Description in, to be fair and clear.

The particulars should fairly and accurately (*e*) describe the estate; if, although grammatically correct, they are so obscure as to be likely to deceive an ordinary purchaser, the sale will be liable to be set aside (*f*): nor is it sufficient for them merely just to tell what is not actually untrue, omitting a great deal that is true, and leaving the purchaser to ascertain the existence of any error or omission; but they should describe everything which it is material for him to know in order to judge of the nature or value of the property (*g*): and the vendor, before he sells, is bound to make himself acquainted with its peculiarities and incidents (*h*), so far as may be necessary in order to avoid serious error in the description: and a plan, if referred to in aid of the description, should be

(*a*) *Gillatt* v. *Gillatt*, 9 Eq. 60.

(*b*) *Ibid.*

(*c*) *Parfitt* v. *Jepson*, 46 L. J. C. P. 529.

(*d*) *Wood* v. *Manley*, 11 A. & E. 34.

(*e*) See *Calverley* v. *Williams*, 1 V. 210, 213.

(*f*) *Taylor* v. *Martindale*, 1 Y. & C. C. C. 658; *Symons* v. *James*, *ib.* 490; *Martin* v. *Cotter*, 3 J. & L. 496; *Swansland* v. *Dearsley*, 29 B. 430; as to annual value, see *Lowndes* v. *Lane*, 2 Cox, 363, and *White* v. *Cuddon*, 8 C. & F. 766; and as to a deceptive statement as to occupancy, *Lachlan* v. *Reynolds*, Kay, 52.

(*g*) *Baskcomb* v. *Beckwith*, 8 Eq. 100.

(*h*) See *Brandling* v. *Plummer*, 2 Dr. 430; *Heywood* v. *Mallaheu*, 25 Ch. D. 357, 364.

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perfectly accurate; thus where the sale plan showed what was an apparent, but not the real boundary of the property, and a personal inspection by the purchaser failed to correct the misapprehension caused by the plan, the vendor's bill for specific performance was dismissed (*i*). On the sale of a partial interest, any substantial (*k*) variation from the description will, at Law as in Equity, render the contract voidable (*l*).

What particulars should state.

It is the proper office of the particulars to describe the subject-matter of the contract, and of the conditions to state the terms on which it is sold (*m*); and the omission from the particulars of some fact which ought to have been stated there will not necessarily be remedied by a statement of it, however explicit, in the conditions; unless of course it can be shown that the purchaser's attention was expressly directed to it. Thus, where a printed particular described the property as an immediate absolute reversion falling into possession on the death of a lady aged 70, and it appeared from the written conditions, which were read but not distributed at the sale, that the property was sold subject to three mortgages, the purchaser, who did not understand that he was buying an equity of redemption, was held entitled to have his contract rescinded, and under the special circumstances the vendor was condemned in costs (*n*).

Agreement to sell land, what it includes.

An agreement to sell land is, in the absence of any restrictive expressions, an agreement to sell the whole of the vendor's interest therein (*o*); and such interest, if not described, will be implied to be an estate in fee simple (*p*), free from

(*i*) *Denny* v. *Hancock*, 6 Ch. 1; *Brewer* v. *Brown*, 28 Ch. D. 309. See *Arnold* v. *Arnold*, 14 Ch. D. 270.

(*k*) See *Bilworth* v. *Hassell*, 4 Camp. 140; and in Equity, *Vignolles* v. *Bowen*, 12 Ir. Eq. R. 194.

(*l*) See *Thompson* v. *Miles*, 1 Esp. 184; *Farrer* v. *Nightingal*, 2 Esp. 639; *Hearn* v. *Tomlin*, 1 Peo. 253; *Hibbert* v. *Shee*, 1 Camp. 113.

(*m*) Per V.-C. Malins, in *Torrance* v. *Bolton*, 14 Eq. 130.

(*n*) *Torrance* v. *Bolton*, 8 Ch. 118; *Tate* v. *Gardiner*, 10 I. R. C. L. 460.

(*o*) *Bower* v. *Cooper*, 2 Ha. 408.

(*p*) *Hughes* v. *Parker*, 8 M. & W. 244; and see *Cattell* v. *Corrall*, 4 Y. & C. 228, 236; Sug. 298.

incumbrances (*q*): but the legal implication may be rebutted by showing that the purchaser knew that the estate he was contracting for was not freehold (*r*), or that it was subject to restrictions which he knew to be incapable of removal or release (*s*). Where, however, the agreement to give a good title is not a matter of legal implication merely, but is an express provision of the contract, evidence of the purchaser's knowledge is inadmissible to contradict the express terms of the contract (*t*). Unless the contrary be expressed, the interest offered for sale (whether it be absolute or qualified), will be presumed to be accompanied by all those advantages which are legally incidental to it (*u*). Therefore, an infringement of the rule, *Cujus est solum ejus est usque ad cœlum* (*x*), is (if not mentioned in the particulars) sufficient to render the contract voidable by the purchaser (*y*): so, where there was no title to an underground cellar, the defect was held fatal (*z*): so, where there was a want of title to such a proper access to a house as, under the description, the purchaser was justified in expecting (*a*); so, where on a sale of arable land no right of way was shown thereto for carts and carriages (*b*); so, where on a sale of ground rents proper powers of distress and entry could not be conferred on the purchaser (*c*). And where a lessee agreed to buy the house leased to him, and described as being then in his own occupation, it was held that he was not bound to complete except upon the terms of

All legal incidents presumably accompany estate.

(*q*) *Doe* v. *Stanion*, 1 M. & W. 695; *Ogilvie* v. *Foljambe*, 3 Mer. 53, 64; *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159.

(*r*) See *Cowley* v. *Watts*, 17 Jur. 172; *Cox* v. *Middleton*, 2 Dr. 217.

(*s*) *Re Gloag and Miller's Contract*, 23 Ch. D. 320, 327; *Ellis* v. *Rogers*, 29 Ch. D. 661, 666.

(*t*) *Cato* v. *Thompson*, 9 Q. B. D. 616.

(*u*) *Shull* v. *Glenister*, 16 C. B. N. S. 81, case of right of way appurtenant, though not mentioned, passing by a parol demise; *Cato* v. *Thompson*, *suprà*.

(*x*) "*Et ad inferos*," see *Lewis* v. *Braithwaite*, 2 B. & Ad. 437; *Keyse* v. *Powell*, 2 E. & B. 132; *Sparrow* v. *Oxford, &c. R. Co.*, 2 D. M. & G. 108.

(*y*) *Pope* v. *Garland*, 4 Y. & C. 403.

(*z*) *Whittington* v. *Corder*, 16 Jur. 1034.

(*a*) *Stanton* v. *Tattershall*, 1 S. & G. 529.

(*b*) *Denne* v. *Light*, 3 Jur. N. S. 627; see and distinguish *Curling* v. *Austin*, 2 Dr. & S. 129.

(*c*) *Langford* v. *Selmes*, 3 K. & J. 220.

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his having a cellar which passed by the lease, but which was not in his occupation at the date of the contract (*d*).

Minerals, when not included.

But an agreement to sell land to a Railway (*e*) or Waterworks Company (*f*), or other Company, subject to the provisions of the Lands Clauses Consolidation Acts, does not include the minerals (*g*), unless they are expressly comprised in the purchase: and the mere agreement to sell a house and land has been held not to pass the right to an unascertained allotment under a recent Inclosure Act (*h*); but by the General Inclosure Act (*i*) it is now provided that if an interest in land is sold before the allotment in respect of it is made, the allotment shall be made to the purchaser.

Allotments.

Restrictions to be guarded against on purchase from railway companies.

It must be borne in mind that, although a conveyance of land to a Railway Company, under the 81st section of the Lands Clauses Consolidation Act, destroys all rights and interests in the land purchased, if compensation is paid for them, yet if no compensation is made under sect. 68, they still exist and are binding on a purchaser from the Company (*k*). So, where a Railway Company purchased land, which had been allotted under an Inclosure Act, with a condition annexed that the land so allotted should never be used for building purposes, and afterwards sold it to a purchaser

(*d*) *Whittington* v. *Corder*, 16 Jur. 1034.

(*e*) 8 V. c. 20, s. 77.

(*f*) 10 V. c. 17, s. 18.

(*g*) Stone is such as between vendor and purchaser for the purposes of an exception of minerals. See *Bell* v. *Wilson*, 1 Ch. 303; *M. R. Co.* v. *Checkley*, 4 Eq. 19, 25; so, also, china clay, *Hext* v. *Gill*, 7 Ch. 699; but the surface owner was held entitled to an injunction against working the clay so as to destroy the surface. So, also, coprolites under a copyhold tenement, *A.-G.* v. *Tomline*, 5 Ch. D. 750. See also *M. R. Co.* v. *Haunchwood Brick and Tile Co.*, 20 Ch. D. 552; *Jamieson* v. *N. B. R. Co.*, 6 Scot. L. R. 188; *Dixon* v. *Cal. R. Co.*, 5 Ap. Ca. 820, where a bed of clay used for making a peculiar kind of brick, freestone worked by an open quarry, and a limestone quarry worked by open workings, were respectively held to be mines within sect. 77 of the Railway Clauses Consolidation Act. And cf. *A.-G. for Isle of Man* v. *Mylchreest*, 4 Ap. Ca. 294; *Tucker* v. *Linger*, 8 Ap. Ca. 508; *A.-G.* v. *Welsh Granite Co.*, 35 W. R. 617.

(*h*) *Fife* v. *Clayton*, 1 Coop. t. Cott. 351; and see *Williams* v. *Phillips*, 8 Q. B. D. 437.

(*i*) 8 & 9 V. c. 118, s. 84.

(*k*) *Ellis* v. *Rogers*, 29 Ch. D. 661.

as superfluous land, it was held to have become again subject to the restriction (*l*).

Permanent charges and restrictive rights should be noticed.

Any charge upon the estate, or right restrictive of the purchaser's absolute enjoyment of it, and the release of which cannot be procured by the vendors, should be stated in the particulars; or the omission may, in many cases, render the sale voidable by the purchaser (*m*), *e.g.*, a right of sporting over the estate (*n*), a right of common every third year (*o*), a right to dig for mines (*p*), a liability to repair the church chancel (*q*), or (it is conceived) a liability to heriots—unless capable of being immediately enfranchised (*r*)—or any other right or liability which cannot fairly admit of compensation, would, if undisclosed, have that effect.

Rights of way, or water.

Rights of way or water (*s*) (if any) should be referred to; for although a mere non-disclosure of their existence might not, in general, avoid the contract (*t*), the Court would readily lay hold of anything in the particulars, &c., at all inconsistent with their existence, as a ground for relieving a purchaser.

And anything which may determine vendor's interest.

So, if the vendor's interest be in any way determinable, the fact should appear; for when a redeemable annuity was offered for sale, simply as an annuity (*u*), and leasehold houses were sold, without any mention being made of a *private* Act of Parliament which gave a Company the right to purchase them (*x*), the sales were held invalid.

But not matter of

The vendor, however, is not bound to mention in the par-

(*l*) *Bird* v. *Eggleton*, 29 Ch. D. 1012.

(*m*) Sug. 5, 6, 311, 312; and see *Torrance* v. *Bolton*, 8 Ch. 118; *Nottingham Brick Co.* v. *Butler*, 16 Q. B. D. 778.

(*n*) *Burnell* v. *Brown*, 1 J. & W. 172.

(*o*) *Gibson* v. *Spurrier*, Pea. A. C. 50.

(*p*) *Seaman* v. *Vawdrey*, 16 V. 390. See *Ramsden* v. *Hirst*, 6 W. R. 349.

(*q*) *Forteblow* or *Horniblow* v. *Shirley*, 2 Sw. 223; 13 V. 81.

(*r*) See 15 & 16 V. c. 51, s. 27; but see sect. 48.

(*s*) See *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609; *Heywood* v. *Mallalieu*, 25 Ch. D. 357.

(*t*) *Oldfield* v. *Round*, 5 V. 508.

(*u*) *Coverley* v. *Burrell*, Sug. 27.

(*x*) *Ballard* v. *Way*, 1 M. & W. 520.

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which purchaser has notice; *e. g.* stringent covenants on sale of leaseholds:

ticulars any matter affecting the property, and of which the purchaser has notice in the legal sense of the word: *e. g.*, on the sale of leaseholds, the fact that the covenants and restrictions in the lease are unusually stringent need not be stated; for the purchaser, having notice of the lease, should satisfy himself as to the contents before he buys (*y*): but in such a case a reasonable opportunity ought to be allowed the purchaser of examining the lease (*z*).

Or fines or customs on sale of copyholds:

So, on the sale of copyholds, the particulars need not refer to the fines or customs of the manor; those being generally incidental to copyhold tenure (*a*): nor need they refer to the fact that the minerals cannot be worked without the lord's consent (*b*), nor to the fact that timber cannot be cut without his consent.

Or quit rents, &c., on sale of manorial freehold:

So, where, on the sale of freeholds, it distinctly appears by the particulars that the land is held of a manor, the vendor need not, it is conceived, refer to the existence of quit rents, or even heriots (*c*). At Law their non-disclosure has been treated as constituting a fatal objection (*d*), although in Equity they might, if small, be treated as matter for compensation (*e*). The fair and proper course, however, is to mention their existence.

Or statutory local taxes:

So, where land is sold as fen land, the particulars need not refer to embanking and drainage taxes, to which it is subject under a local but public Act of Parliament (*f*).

Or notorious local customs:

So, on the sale of lands within the mining districts, any reference to the rights of mining (*g*) under the local customs

(*y*) *Hall* v. *Smith*, 14 V. 426; *Pope* v. *Garland*, 4 Y. & C. 394; *Paterson* v. *Long*, 6 B. 590; *Lewis* v. *Bond*, 18 B. 85; but see *ante*, pp. 105, 106.

(*z*) *Brumfit* v. *Morton*, 3 Jur. N. S. 1198; *Hyde* v. *Warden*, 3 Ex. D. 72, 80.

(*a*) See and consider *White* v. *Cuddon*, 8 C. & F. 766.

(*b*) *Hayford* v. *Criddle*, 22 B. 480.

(*c*) See *Damerell* v. *Protheroe*, 10 Q. B. 20, showing that heriots may be due in respect of freeholds; *Lord Chichester* v. *Hall*, 17 L. T. O. S. 121.

(*d*) *Turner* v. *Beaurain*, Sug. 312.

(*e*) *Vide post*, p. 1205.

(*f*) *Barraud* v. *Archer*, 2 R. & M. 751.

(*g*) As to which, see *Rogers* v. *Brenton*, 12 Jur. 263; *Rowe* v. *Brenton*, 3 Man. & R. 247, 339, 341, 344.

would, it is conceived, be unnecessary; as their existence is matter of notoriety (*h*).

But the particulars must contain no misrepresentation; *e.g.*, if, on the sale of leaseholds, the terms of the lease are mis-stated, the sale may be set aside; even although the auctioneer read the lease at the sale (*i*). So, where on a sale by the Court of leasehold properties held under a corporation, which usually reserved mere nominal rents, a full detailed description was given of one of the lots, which did not state that it was subject to a heavy ground rent, the purchaser was discharged from his purchase (*k*).

But no misrepresentation allowable: *e.g.* mis-statement of lease:

So, where property thirty-three feet in depth was described as forty-six feet deep, the purchaser was allowed an abatement of the price, although he was the occupying tenant (*l*).

Or of dimensions of property:

So, where redeemed land tax, consisting of several sums charged on distinct tenements, was described as an aggregate sum issuing out of all, the misdescription was held to be a fatal objection to the title (*m*).

Or as to redeemed land tax:

And the effect of what would otherwise be notice may be destroyed, not only by actual misdescription or misstatement, but by anything calculated to deceive, or even lull suspicion, upon the particular point; as where lot A. (building land) was expressed to be sold subject to the rights of way reserved by the existing leases of adjoining property B., and a plan,

Nor anything calculated to deceive, &c.

Reference to deceptive plan.

(*h*) And see now, as to the Hundred of High Peak, Derbyshire, 14 & 15 V. c. 94; and *Wale* v. *Hall*, 8 Ap. Ca. 195. In the Forest of Dean the customs have been regulated by 1 & 2 V. c. 43, amended by 24 & 25 V. c. 40, and 34 & 35 V. c. 85. See Wood on Dean Forest; MacSwinney, c. 20. As to the customs of Devon and Cornwall, see Stannary Laws, and MacSwinney, c. 18.

(*i*) *Flight* v. *Booth*, 1 Bing. N. C. 379; *Jones* v. *Edney*, 3 Camp. 285; and see *Van* v. *Corpe*, 3 M. & K. 269; *Flight* v. *Barton*, *ib.* 282; *Stanley* v. *McGauran*, 11 L. R. Ir. 314.

(*k*) *Jones* v. *Rummer*, 14 Ch. D. 588. In this case there was no actual mis-statement, and yet the particular was held to be misleading.

(*l*) *King* v. *Wilson*, 6 B. 124. See *Whittington* v. *Corder*, 16 Jur. 1034.

(*m*) *Cox* v. *Coventon*, 31 B. 378.

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specially referred to in the particulars, disclosed a carriage-way reserved over A. to B., and also a way reserved over A. to another lot C., but gave no indication of *another* way reserved over A. to B., the particulars and plan were treated as deceptive; and the purchaser was held not bound, under the particular circumstances, to have inspected the leases (*n*).

Or deceptive statement as to covenants.

So, where a lessee sold, (by way of underlease,) part of a demised estate, and the particulars mentioned that the original lease contained a power of re-entry on breach of a covenant against certain trades being carried on upon the premises, and that the purchasers must enter into similar covenants, but did not state the fact—which is a serious defect in the title (*o*)—that some underleases, already granted of parts of the property, contained no such covenants, the purchaser recovered his deposit at Law (*p*). So, in Equity, a vendor of property on lease is not justified in parading upon his particulars the existence of covenants beneficial to the estate, but which he knows, or has good reason to believe, cannot be enforced (*q*): although he is not, as a general rule, bound to show who are *nominatim* the parties liable upon such covenants (*q*).

On sale of lease, removal of buildings to be stated.

Where a lease, which contains the usual covenant to deliver up the premises in good repair at the end of the term, is sold, and any of the demised buildings have been removed, the fact should be stated: the omission of the buildings from the particulars is not sufficient (*r*). So, where other property is comprised in the lease (*s*), or the interest offered for sale is an underlease (*t*), the fact should appear in the particulars or

Sale of part of demised property, or of underlease.

(*n*) *Dykes* v. *Blake*, 4 Bing. N. C. 463; and see *Gibson* v. *D'Este*, 2 Y. & C. C. C. 542; *Baskcomb* v. *Beckwith*, 8 Eq. 100; *Arnold* v. *Arnold*, 14 Ch. D. 270. See also *Jones* v. *Rimmer*, 14 Ch. D. 588.

(*o*) *Darlington* v. *Hamilton*, Kay, 550; *Bartlett* v. *Salmon*, 6 D. M. & G. 33.

(*p*) *Waring* v. *Hoggart*, Ry. & Mo. 39; and see *Dawes* v. *Betts*, 12 Jur. 412, 709; and *Spunner* v. *Walsh*, 11 Ir. Eq. R. 597.

(*q*) *Flint* v. *Woodin*, 9 Ha. 618.

(*r*) *Granger* v. *Worms*, 4 Camp. 83.

(*s*) *Tomkins* v. *White*, 3 Smith, 435; *Leuty* v. *Hillas*, 2 D. & J. 110, 122; *Brumfit* v. *Morton*, 3 Jur. N. S. 1198; which see as to "derivative lease" and "underlease" being convertible terms.

(*t*) *Madely* v. *Booth*, 2 De G. & S. 718;

conditions: and its omission may be considered a sufficient ground for refusing specific performance (*u*).

Discrepancy between particulars and lease.

Where the particulars refer to the lease, and there is a discrepancy between the two, and the terms of the lease are the more favourable to the purchaser, the vendor is bound by the description in the lease, and must show a title in conformity therewith (*x*).

Puffing statements.

As respects commendatory statements and descriptions in the particulars, which are separated from actual misdescription by a very narrow boundary, we may refer to the observations already made in Ch. III.; a fair and correct description will be found to be as agreeable with sound policy as it is with morality.

Reference to plan.

When a plan of the estate is attached to, or accompanies, the particulars, or is so incorporated in the contract as to control the description (*y*), and is incorrect, it will be a material consideration with the Court whether the purchaser was thereby misled: but, if accurate, it is merely tantamount to a view of the property: so that when an estate was sold in lots, and it correctly appeared by the plan that lot 1, an Inn, was supplied with water by a drain leading from a well in lot 4, this was held to be merely expressive of the physical fact, and not to amount to any engagement on the part of the vendor that there should be a reservation of a right to water in the conveyance of lot 4: and a bill filed by the purchaser of lot 1 for compensation, was dismissed with costs (*z*). But where the plan so represents adjoining land as to make it apparently part

but see Sir G. Jessel's comments on this case in *Camberwell and South London Building Society* v. *Holloway*, 13 Ch. D. 754, 760.

(*u*) *Brumfit* v. *Morton*, 3 Jur. N. S. 1198; *Creswell* v. *Davidson*, 56 L. T. 811, which decided that the relief afforded by s. 14 of Conv. Act, 1881, has not altered the rule. See, too, *Hayford* v. *Criddle*, 22 B. 477, where, however, the purchaser knew he was buying an underlease; *Flood* v. *Pritchard*, 40 L. T. 873. See, too, *Darlington* v. *Hamilton*, Kay, 550, where the point was considered doubtful; and cf. *Camberwell, &c. Building Society* v. *Holloway*, *suprà*.

(*x*) *Bentley* v. *Craven*, 17 B. 204.

(*y*) *Nene Valley Commissioners* v. *Dunkley*, 4 Ch. D. 1.

(*z*) *Fewster* v. *Turner*, 6 Jur. 144; and see *Dykes* v. *Blake*, 4 Bing. N. C. 463.

of the property, and the purchaser is thereby misled, this may be a ground for refusing a decree for specific performance against him (a). Thus, where an estate was sold in lots, subject to restrictive covenants as to the trades to be carried on upon the estate, and the vendor retained a small plot which, though shown on the plan, was not coloured, or marked with his name, as in the case of other adjoining owners, the Court refused to enforce the contract against a purchaser of one of the lots, unless the vendor entered into similar restrictive covenants as to the excepted plot (b).

To plan showing intended adjacent roads and improvements.

So, on the sale or lease of building ground, the exhibition, on the plan, of intended roads or other improvements on the adjacent land does not bind the vendor or lessor to make or execute such roads or improvements (c), nor entitle the purchaser or lessee to a grant of right of way over any roads so laid down on the plan, except such as form the direct means of communication with the nearest highway (d); but a vendor would not, it appears, be allowed to divide and appropriate the land in a different manner, so as to attract an occupancy and population entirely different from that which would probably have been produced by acting on the plan proposed and held out at the sale (e). On the other hand, when a house is sold "with all its lights," a statement in the particulars that adjoining land, belonging to the vendor, is building land, does not authorize the vendor, or a purchaser from him, to build upon the adjoining land, so as to obstruct such lights (f).

Statement that adjoining land is building land.

(a) See *Wilson* v. *Bird*, 2 W. R. 145; *Denny* v. *Hancock*, 6 Ch. 1; *Arnold* v. *Arnold*, 14 Ch. D. 270; *Breuer* v. *Brown*, 28 Ch. D. 309; and *ante*, pp. 127, 128.

(b) *Baskcomb* v. *Beckwith*, 8 Eq. 100.

(c) *Feoffees of Heriot's Hospital* v. *Gibson*, 2 Dow, 301; *Squire* v. *Campbell*, 1 M. & C. 459; *Nurse* v. *Lord Seymour*, 13 B. 269; see *Schreiber* v. *Creed*, 10 Si. 9; but see also *Beaumont* v. *Duke*, Jac. 422; and see *Nicholson* v. *Rose*, 4 D. & J. 10.

(d) *Randall* v. *Hull*, 4 De G. & S. 343; but *quære*, whether the vendor, refusing to grant a right of way, at any rate over such roads as might eventually be made, could enforce specific performance. See judgment.

(e) *Peacock* v. *Penson*, 11 B. 355; upon the construction of covenant to make roads, see *Mason* v. *Cole*, 4 Ex. 375.

(f) *Swansborough* v. *Coventry*, 9 Bing. 305; but see and distinguish

Vendor of house retaining adjoining land cannot obstruct lights.

We may here remark it to be well established that where a person owns a house, having the actual use and enjoyment of certain lights, and also holds the adjoining land, and sells the house, he cannot, although the lights be *new*, nor can any one who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights (*g*).

Reference to plans.

Care should be taken upon the sale of house property or building land which has been described in the title-deeds by reference to indorsed plans and a scale of measurement, to ascertain that the measurement is correct: a slight variation may lead to serious difficulty with a purchaser.

Meaning of particular expressions.

In the construction of particulars of sale, the Courts have attached the following meanings to the following expressions: viz:—

"Brick-built house;" "Substantial."

A house described as "brick-built" is understood to be brick-built in the ordinary sense of the words; not composed externally partly of brick and partly of timber and lath and plaster (*h*): but the description of a house as "substantial and convenient" is merely relative; and in one case, where a house was so described, the purchaser was held to his bargain, although one of the external walls was only half a brick in thickness (*i*).

"Clear yearly rent."

By "clear yearly rent," is understood a rent clear of all outgoings (*k*), &c., usually borne by the tenant; but subject to such (*e.g.*, land tax) as are borne by the landlord (*l*).

Booth v. *Alcock*, 8 Ch. 667; *Wheeldon* v. *Burrows*, 12 Ch. D. 31; *Allen* v. *Taylor*, 16 Ch. D. 355; and see this subject fully considered, *post*, p. 408 *et seq.* As to the use of general words, see *post*, p. 605 *et seq.*

(*g*) *Per curiam*, 9 Bing. 309; and see as to new windows, *Compton* v. *Richards*, 1 Pr. 27; and *Blanchard* v. *Bridges*, 4 A. & E. 176.

(*h*) *Powell* v. *Doubble*, Sug. 29.

(*i*) *Johnson* v. *Smart*, 2 Gif. 151.

(*k*) As to what is included in the word "outgoings," see *Lawes* v. *Gibson*, 1 Eq. 135; *Crosse* v. *Raw*, L. R. 9 Ex. 209; *Midgley* v. *Coppock*, 4 Ex. D. 309; *Aldridge* v. *Ferne*, 17 Q. B. D. 212.

(*l*) *Earl of Tyrconnell* v. *Duke of Ancaster*, 2 V. sen. 500.

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"Farm;"

The expression "farm," includes woodland, part of the estate, although not in the occupation of the tenant (*m*).

"Public house,"

A house where beer was sold by retail under a licence "not to be drunk on the premises," has been held not to be a public house for the sale of beer (*n*). But a house used exclusively for the sale of beer to be drunk off the premises, although held not to be "a beer-house" (*o*), is a "beer-shop" (*p*); and a covenant not to build anything but dwelling-houses, except on a certain part, where "shops" might be erected, does not entitle the purchaser to sell the excepted part as a site for "taverns" (*q*).

"Free public house,"

The expression "free public house," is a misdescription when the lease contains a covenant to take beer from the lessor (*r*).

Ground rent."

By the expression "ground rent," if unexplained, is to be understood a rent less than the rack rent of the premises: its proper meaning is the rent at which land is let for the purpose of improvement by building (*s*): but the expression is very carelessly used. Where what was called a ground rent was in fact a sum in gross, paid for the right of user of a pleasure ground, the purchaser was allowed to rescind his contract and recover his deposit (*t*).

Precautions to be observed on sale of manor.

On the sale of a manor, care should be taken to ascertain accurately what are its constituents. Minerals under tenemental freeholds, or under lands formerly copyhold of the

(*m*) *Portman* v. *Mill*, 3 Jur. 356.

(*n*) *Pease* v. *Coats*, 2 Eq. 688, *sed qu.* See *Tolldin* v. *Slater*, 7 Eq. 523; and *Jones* v. *Bone*, 9 Eq. 674.

(*o*) *L. & N. W. R. Co.* v. *Garnett*, 9 Eq. 26.

(*p*) *Bishop of St. Albans* v. *Battersby*, 3 Q. B. D. 359; and see *London and Suburban Co.* v. *Field*, 16 Ch. D. 645; and *Holt* v. *Collyer*, *ib.* 718; *Nicoll* v. *Fenning*, 19 Ch. D. 258, 267.

(*q*) *Coombs* v. *Cook*, 1 C. & E. 75.

(*r*) *Jones* v. *Edney*, 3 Camp. 285; *Modlin* v. *Snowball*, 29 B. 641; 4 D. F. & J. 143.

(*s*) *Stewart* v. *Alliston*, 1 Mer. 26; but see *Bartlett* v. *Salmon*, 6 D. M. & G. 33; and cf. *Lecoy* v. *Mogford*, 2 Jur. N. S. 1084.

(*t*) *Evans* v. *Robins*, 1 H. & C. 302; and see *Langford* v. *Selmes*, 3 K. & J. 220.

manor but since enfranchised, an advowson, or allotments made to the lord upon inclosure of wastes, may form parcel of the manor without the fact being suspected: and would pass under the ordinary words of conveyance of the manor, unless specially excepted (*u*).

Section 3.

(3.) *As to the Conditions.*

Conditions should be printed.

The conditions of sale should be printed and circulated some time previously to the sale, or at any rate in the auction-room, so as to give each person an opportunity of ascertaining the terms on which the property is sold. The system which is adopted by many of the provincial Law Societies, of having printed common-form conditions which are used on every sale, and to which are prefixed the special conditions under which the particular property is sold, has much to recommend it; the effect of the common-form conditions is well understood, and the attention of the purchaser and his solicitor is at once directed to the special restrictive conditions. The practice, which still prevails in some parts of the country, of having written conditions which are merely produced and read over, but not circulated in the auction-room, cannot be too strongly reprobated; and, if the purchaser is thereby misled, or not fully informed, on a material point, may result in the rescission of the contract (*x*).

Against retracting biddings.

Whether or not binding.

In the absence of stipulation, a bidder at an auction may, audibly, before the fall of the hammer, retract his bidding (*y*); a condition negativing this right is almost always inserted, and is recommended by Lord St. Leonards, who nevertheless expresses his opinion that it cannot be enforced (*z*): such a

(*u*) See *A.-G.* v. *Ewelme Hospl.*, 17 B. 366; *Hicks* v. *Sallitt*, 3 D. M. & G. 782; *Hicks* v. *Hastings*, 3 K. & J. 701; and sect. 6 (3) of the Conv. Act, 1881. As to the case of the sale of a copyhold farm, see *Williams* v. *Phillips*, 8 Q. B D. 437, where allotments made in lieu of common rights formerly belonging to the owner were held not to pass with the farm.

(*x*) *Torrance* v. *Bolton*, 8 Ch. 118; and *vide ante*, p. 128.

(*y*) *Payne* v. *Cave*, 3 T. R. 148; *Routledge* v. *Grant*, 4 Bing. 653, 660.

(*z*) Sug. 14; referring to *Jones* v. *Nanney*, 13 Pr. 99.

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condition, however, was held to bind a mortgagee's solicitor, who bid at the sale of the mortgaged property made by the Court with the mortgagee's concurrence (*a*).

For withdrawing lots.

In some cases it may be desirable that the vendor should reserve to himself the option of withdrawing any lots from the sale, whether they shall have been offered to public competition or not, as, *e.g.*, in the case of a disputed bidding, or where there is not an adequate demand for the lots which are being brought into the market, or where, on the sale of a building estate, the lots which are first offered, and which from their position or other circumstances materially affect the value of the remaining lots, do not fetch the price put upon them, and are in consequence bought in.

For reserved bidding.

On sales by auction, where the property is offered for sale subject to a reserved price, this must be expressly stated; and if the vendor is desirous of reserving the right to bid, either by himself or his agent, this must be expressly provided for (*b*), and the bidding strictly confined within the powers reserved by the condition (*c*).

Payment and investment of deposit.

On a sale by auction, it is usual to require payment of a deposit by the purchasers; and this may often be a prudent precaution on a sale by private contract: if the deposit will be of large amount, it may be well to provide for its investment, *e.g.* in Exchequer Bills or upon deposit with Bankers of repute, in order that there may be no loss of interest, nor liability in respect to the depreciation of securities. It has been recently held that the custom of auctioneers to accept the purchaser's cheque is reasonable (*d*).

Delivery of abstract.

It is also the ordinary practice to provide that the vendor shall, within a specified time, at his own expense, make and

(*a*) *Freer* v. *Rimner*, 14 Si. 391.

(*b*) 30 & 31 V. c. 48, and *ante*, p. 126; *Gilliatt* v. *Gilliatt*, 9 Eq. 60; and *post*, Ch. V. s. 5.

(*c*) *Parfitt* v. *Jepson*, 46 L. J. C. P. 529.

(*d*) *Farrer* v. *Lacy Hartland*, 31 Ch. D. 42.

deliver to every purchaser an abstract of the title to the lot or lots purchased by him; but the vendor is, independently of any condition, bound to deliver an abstract; a delivery of the title deeds is not sufficient (*e*); the condition, however, is useful as fixing the time for delivery. But if there is any doubt as to the vendor's ability to make out and deliver a sufficient abstract by the specified day, it is better to omit the condition: for if he fail to deliver the abstract within the period appointed, or if the abstract delivered be very imperfect, any condition binding the purchaser to make his objections within a specified time will fail of effect (*f*).

Restrictive of purchaser's right to abstract.

When the lots are small, and the title is voluminous, it may be well to stipulate that no purchaser, whose aggregate purchase-money shall not amount to a specified sum, shall be entitled to an abstract, (or an abstract going back beyond a certain date,) except at his own expense: but in such case it may be prudent to state that a full abstract will be deposited with the vendor's solicitor, or elsewhere, for inspection by purchasers and their solicitors. Before the Conveyancing Act, 1881, it was generally considered that a purchaser at the same auction of several lots held under the same title was entitled, in the absence of express stipulation to the contrary, to several abstracts; and it was therefore usual to provide by the conditions that a purchaser of several lots should be entitled to only a single abstract, except at his own expense. Under the recent Act, this is now the general rule as respects future sales, unless a contrary intention is expressed in the contract (*g*). It may sometimes also be desirable to preclude a purchaser of several lots from requiring separate conveyances; which, as it is conceived, he may require, if not so precluded. Such a condition, however, is rare in practice.

Where he buys several lots under the same title.

If any other condition refer to "the delivery of the

"Abstract" means "per-

(*e*) Sug. 406; *Horne* v. *Wingfield*, 3 Sc. N. R. 340.

(*f*) *Southby* v. *Hutt*, 2 M. & C. 207; *Sherwin* v. *Shakspear*, 5 D. M. & G. 517; *Upperton* v. *Nicholson*, 6 Ch. 436; and see 1 Dav. 525; which see as to conditions of sale generally.

(*g*) 44 & 45 V. c. 41, s. 3, sub-s. 9.

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"perfect abstract."

abstract," this, in any question as to time, will be held to mean the delivery of a *perfect* abstract (*h*): *i. e.*, an abstract as perfect as the vendor could furnish at the time of delivery (*i*); although it may be an abstract of a defective title (*k*); and if it contains, with sufficient fulness, the effect of every instrument which constitutes the title, it will be deemed sufficient to satisfy the condition; and time will begin to run against the purchaser as from the date of its delivery (*l*); and an abstract as delivered is presumed to be *perfect*, unless the contrary is shown (*m*).

Effect of non-delivery of, on conditions as to time.

If the vendor fail to deliver a perfect abstract within the time specified, the purchaser is relieved from any condition binding him to object to the title within a given period after delivery of the abstract (*n*): it is not unusual to guard against this rule, by providing, (in the condition as to objections,) that "an abstract shall, as regards any objection or requisition, be considered perfect, if it supply the information suggesting the same, although it may be otherwise defective" (*o*).

Condition as to completion, and interest.

It is usual, and proper, in every case to specify the day on which the purchase is to be completed, and from which the purchaser is to have possession (*p*), or (if it be in lease) receipt of the rents and profits of the estate, and to pay interest (which may be reserved according to an ascending scale) (*q*) upon the purchase-money, if not then paid; and up to which day the vendor is to pay the outgoings (*r*). This

(*h*) *Hobson* v. *Bell*, 2 B. 17.

(*i*) *Morley* v. *Cook*, 2 Ha. 111.

(*k*) *Blackburn* v. *Smith*, 2 Ex. 789; see *Want* v. *Stallibrass*, L. R. 8 Ex. 175, 179.

(*l*) *Oakden* v. *Pike*, 34 L. J. Ch. 620.

(*m*) *Ward* v. *Ghrimes*, 9 Jur. N. S. 1097. See *Gray* v. *Fowler*, L. R. 8 Ex. 249; and see p. 279, where the passage in the text is cited with approval by Blackburn, J.

(*n*) *Blacklow* v. *Laws*, 2 Ha. 40; *Southby* v. *Hutt*, 2 M. & C. 211; *Gray* v. *Fowler*, L. R. 8 Ex. 279.

(*o*) And see also Ch. VIII. s. 2.

(*p*) As to the meaning of "possession," *vide post*, p. 145.

(*q*) *Herbert* v. *Salisbury and Yeovil R. Co.*, 2 Eq. 221.

(*r*) The word "next," as an attribute of the day for completion is generally to be read not with the month which immediately precedes it, but with the whole description; *e. g.*, "the 25th day of December

condition, as to time, will not, however, in ordinary cases, be binding in Equity, unless time be declared to be of the essence of the contract (*s*). A different rule formerly prevailed at Law; but now by the Judicature Act, 1873 (*t*), stipulations in contracts as to time and otherwise, which would not before the Act have been deemed to be or to have become of the essence of such contracts in a Court of Equity, are to receive in all Courts the same construction as they would have formerly received in Equity. It is generally thought best to provide that the arrangement as to payment of interest and receipt of the profits, &c. shall hold, whatever may be the cause of delay in completion (*u*): and it was always considered that the purchaser must, under such a condition, pay interest during the time spent in clearing up the title (*x*): although, of course, it would not justify the vendor in wilful delay (*y*); but where the expression was, "if from any cause whatever the purchase-money shall not be paid on, &c., the purchaser *making default* shall pay interest," &c., it was decided that the purchaser was exempted from payment of interest when the delay arose from the state of the title; inasmuch as he had made *no default* (*z*). In a modern case, at Law, where the agreement was that the purchaser should pay interest from the day fixed for completion, if completion "should be delayed on his part," and the vendor and his trustee were ready to complete on the day named, but the purchaser was not prepared, and afterwards, when the purchaser was ready, the vendor's trustee refused to concur, it was held that interest was not payable after the latter date (*a*): in another case which has been much dis-

Delay "from any cause whatever."

De Visme v. *De Visme.*

next" means the next 25th day of December, not the 25th day of next December; *Dawes* v. *Charsley*, W. N. (1886) 78.

(*s*) *Vide* Ch. X. s. 1.

(*t*) 36 & 37 V. c. 66, s. 25 (7). See *Noble* v. *Edwardes*, 5 Ch. D. 378.

(*u*) "Completion" in such conditions means payment of the purchase-money; *Lewis* v. *South Wales R. Co.*, 10 Ha. 113.

(*x*) See *Greenwood* v. *Churchill*, 8 B. 413; *Esdaile* v. *Stephenson*, 1 S. & S. 122.

(*y*) *S. C.*; see the judgment in *De Visme* v. *De Visme*, 1 M. & G. 336.

(*z*) *Denning* v. *Henderson*, 1 De G. & S. 689.

(*a*) *Perry* v. *Smith*, Car. & M. 554.

cussed (*b*), where the purchase was to be completed and the money paid on a certain day, "but if the purchaser should fail in making such payment, then, from whatever cause the delay might have arisen," interest was to be paid at five *per cent.*; and considerable delay arose in making out the title, it was held, either that the purchaser was not bound to pay interest until a good title was shown, or that, if bound by the condition to such payment, he was entitled to an equivalent compensation from the vendor: this doctrine, as we shall hereafter see, has been much broken down by later cases (*c*); and it may now be taken as well established, that the ordinary condition, whether with or without the words "from any cause whatever," will apply to every case, except where the vendor, notwithstanding the purchaser's active remonstrances, is guilty of wilful default, or of such gross and persistent negligence as is tantamount to wilful default. In order, however, to avoid all possible question as to the scope and meaning of the condition, it may be prudent to frame it thus: "if from any cause whatever, other than the wilful and capricious refusal of the vendor to make out his title or to convey the estate, the purchase shall not be completed on the specified day, the purchaser shall thenceforth pay interest on so much of his purchase-money as for the time being shall remain unpaid, and shall have no claim to compensation in respect of the delay in completion."

How the condition should be framed.

"Receipt of rents and profits."

The common condition that a purchaser, "upon completion, shall be let into the receipt of the rents and profits," *primâ facie* refers only to rents reserved on an ordinary tenancy; and where property was described as "now or late in the several occupations of H. R. and others," and parts of the property were subject to leases for lives at low rents, of which

(*b*) *De Visme* v. *De Visme*, 1 M. & G. 336; *vide infrà*. See as to interest, *Rowley* v. *Adams*, 12 B. 476.

(*c*) See, among others, *Bannerman* v. *Clarke*, 3 Dr. 632; *Vickers* v. *Hand*, 26 B. 630; *Lord Palmerston* v. *Turner*, 33 B. 524; *Williams* v. *Glenton*, 33 B. 528; 1 Ch. 200; and *vide post*, p. 719 *et seq.*, where the effect of this condition is fully considered.

the purchaser had no notice, it was held that the ordinary condition as to letting him into receipt of the rents and profits did not apply, and that he could not be compelled to accept the title without compensation (*d*). But the words "rents and profits" may include an occupation rent (*e*). And in a recent case where the condition was that the purchaser should be entitled to "possession, or to the receipt of the rents and profits," and the vendor was in actual possession, the latter words were held to be "*otiose*" (*f*).

"Possession."

The word "possession" is a flexible term, and does not necessarily import a personal occupation. Thus, where the property, an orchard, was described "as in occupation of L. P.," and the purchaser was to have *possession* on the day fixed for completion, it was held that he could not insist on being put into personal occupation of the property (*g*).

Usury.

We may here remark that an agreement that if the purchase-money were not paid at the time fixed for completion, the purchaser should pay "in lieu of interest upon the same a clear rent of *l. per annum*," was not, while the laws against usury (*h*) were in force, deemed usurious by reason of the rent exceeding the amount of interest at 5*l. per cent.* on the purchase-money (*i*); nor will the Court now relieve against an agreement to pay interest on an increasing scale varying with the continuance of the delay in completion (*j*): but a bond for the purchase-money carrying interest at more than 5*l. per*

(*d*) *Hughes* v. *Jones*, 3 D. F. & J. 307.

(*e*) *Metr. R. Co.* v. *Defries*, 2 Q. B. D. 387.

(*f*) *Anker* v. *Franklin*, 43 L. T. 317.

(*g*) *Lake* v. *Dean*, 28 B. 607.

(*h*) Repealed by 17 & 18 V. c. 90.

(*i*) *Spurrier* v. *Mayoss*, 1 V. 527; 4 Br. C. C. 28; and see *Dowling* v. *Legh*, 3 J. & L. 716; *Belcher* v. *Vardon*, 2 Coll. 162; and *Beete* v. *Bidgood*, 1 Man. & R. 143, 151, where the Court held that future payments reserved under the name of interest, were in fact principal; *Barry* v. *Nesham*, 3 C. B. 641, 654. See, however, as to usury, *Lane* v. *Horlock*, 5 H. L. C. 580; *James* v. *Rice*, Kay, 231; rev. on other grounds, 5 D. M. & G. 461; *Thomas* v. *Cooper*, 18 Jur. 688.

(*j*) *Herbert* v. *Salisbury R. Co.*, 2 Eq. 221.

cent. was formerly usurious (*k*), unless protected by the 2 & 3 Vict. c. 37. We may also remark that the repeal of the usury laws has not affected the jurisdiction of the Court to grant relief against unconscionable bargains (*l*).

Conveyance.

It is usual, on a sale by auction, to provide that the vendor shall, upon payment of the purchase-money, execute proper conveyances to the respective purchasers of the lots purchased by them respectively; such conveyances, &c., to be prepared by and at the expense of the respective purchasers, and by them tendered for execution at a specified time and place. The condition is scarcely necessary; for the contract in itself gives the purchaser a right to a conveyance upon payment of his purchase-money; and he is, *primâ facie*, bound at his own expense to prepare and tender it (*m*). It may sometimes, where time is intended to be of the essence of the contract, be well to stipulate that, in accordance with the universal practice, a draft of the proposed conveyance shall, at a specified time before the day fixed for completion, be furnished for perusal by the vendor's solicitor.

Covenants by trustees and mortgagees.

So, it is usual on a sale by mortgagees or trustees (*n*), to stipulate that they shall be required to covenant only against incumbrances; but the condition is unnecessary, provided that the particulars or conditions give the purchaser notice of the fiduciary character of the vendors (*o*); and were it omitted, the purchaser could neither insist upon any further covenants, nor refuse to complete upon the ground of the vendors declining to enter into them.

Apportionment of accruing rents.

So, it is usual to stipulate that the rents will be received, and the outgoings discharged, by the vendor up to the day

(*k*) *Dewar* v. *Span*, 3 T. R. 425.

(*l*) *Tyler* v. *Yates*, 6 Ch. 665; *Miller* v. *Cook*, 10 Eq. 641; *Earl of Aylesford* v. *Morris*, 8 Ch. 484; *post*, p. 851.

(*m*) Sug. 541; *Poole* v. *Hill*, 6 M. & W. 835.

(*n*) See now the Conv. Act, 1881, s. 7 (f).

(*o*) *Worley* v. *Frampton*, 6 Ha. 560; *Onslow* v. *Lord Londesborough*, 10 Ha. 74; see *post*, p. 622.

fixed for completion, and as from that date by the purchaser, and that if necessary an apportionment of such rents and outgoings shall be made between them. It may be desirable to add, especially when the property is in hand, that the outgoings to be paid by the purchaser shall include all rates made before, but not demanded till after, completion (*p*).

Apportionment of rent-charge.

Where land subject to a rent-charge is sold in lots, and the owner of the rent is unable or unwilling to concur in an apportionment thereof under the provisions of the Inclosure Acts (*q*), or to release the land offered for sale under the 22 & 23 Vict. c. 35, it is usual to stipulate that each purchaser shall pay a specified portion of the rent-charge; and, if he desires it, shall procure an apportionment at his own expense. In such a case, the amount apportioned to each lot should be stated in the particular.

Apportionment of rent service.

If, where property is sold in lots, any part comprised in two or more lots be upon lease at one entire rent, or if all or any part of the property comprised in one lot, be let together with other property at one entire rent, and the consent of the tenant to an apportionment of the rent cannot be obtained prior to the sale, the conditions must provide for its apportionment (*r*); and, although perhaps not strictly necessary, where the intended apportionment of the rent is clearly specified (*s*), it may, by way of precaution, be well to stipulate that the concurrence of the tenant, who is not bound by an apportionment made without his consent, shall not be required (*t*).

Apportionment of rent on severance of reversion.

It may be well to remark here that where the reversion on a lease is severed, and the rent is legally apportioned, the assignee of each part has now, in respect of the apportioned rent allotted to him, the benefit of all conditions or powers of

(*p*) See *Midgley* v. *Coppock*, 4 Ex. D. 309. As to what is included in "outgoings," see *ante*, p. 137.

(*q*) See 17 & 18 V. c. 97, ss. 10, 14.

(*r*) See *Barnwell* v. *Harris*, 1 Taun. 430.

(*s*) *Walter* v. *Maunde*, 1 J. & W. 181.

(*t*) 1 Dav. 547.

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re-entry for non-payment, and of every other condition contained in the lease, as if they had been reserved to him as incident to his part of the reversion in respect of such apportioned rent (*t*).

Apportionment of rent and liabilities on sale of leaseholds in lots.

Where leasehold property held under one demise at an entire rent is offered for sale in lots, provision must be made for the apportionment among the several purchasers of the rent and liabilities under the lease. The lessor is seldom likely to concur in an arrangement, which, while it increases the trouble of collection, may lessen his security for the rent. There is no plan by which such an apportionment may be effected which is wholly free from objection. Sometimes cross powers of entry and distress are given to the several purchasers over the other lots; but where the lots are numerous this is a complicated process; and the most approved plan is to assign the lease to the largest purchaser in value, and to require him to grant derivative leases for the whole term, wanting one day, to the purchasers of the remaining lots at the apportioned rents (*u*).

Crops, &c.

Upon the sale of land used for agricultural purposes, it may be often necessary to insert a condition as to the growing crops being taken and paid for by the purchaser: or as to allowance being made for seed, manure, tillage, and such other things as, according to the local custom, are usually matters for allowance between an outgoing and an incoming tenant (*x*).

Right to, if no condition.

If the property be in lease at the time of sale, the purchaser will, of course, be subject, in these respects, to the rights of the tenants: if, however, it be in hand, and nothing be said as to the crops, they will belong to him from the day

(*t*) Conv. Act, 1881, s. 12, extending the provisions of 22 & 23 V. c. 35, s. 3.

(*u*) Sometimes the purchaser of the largest lot takes an assignment of the whole subject to underleases of the other lots previously granted by the vendor to the respective purchasers. See 1 K. & E. 251.

(*x*) See post, pp. 922 et seq., 985.

fixed for completion; and it is conceived that the vendor will not be at liberty previously to remove them in an immature state: and of course, in the absence of stipulation, the vendor himself could make no claim in respect to seed, manure, tillage, &c.

Fixtures.

There should be a condition as to fixtures (*y*), if the purchaser is to pay for any. In the absence of any express stipulation, common fixtures (*z*), including such as are not strictly fixtures, will be held to be included in a contract for sale; and will pass by the conveyance, unless a contrary intention can be collected from the instrument (*a*).

Timber.

Payment for timber by the purchaser, if intended, must be provided for by the conditions (*b*). The effect of the general condition has been held to be destroyed, as to lots A. and B., by a particular statement being appended to the descriptions of lots C. and D., that the timber on *them* was to be paid for (*c*).

As to what is "timber."

The expression "timber," which means trees fit to be used in building and repairing houses (*d*), includes oak, elm, and ash, everywhere; and, by local custom, beech (*e*), and various other trees, even trees which are primarily fruit trees, as cherry, chesnut, and walnut (*f*); no wood, however, is timber until of twenty years' growth (*g*). As a general rule, pollards

(*y*) As to what are fixtures, *vide post*, p. 607.

(*z*) See, however, *Ex parte Quincy*, 1 Atk. 477.

(*a*) Conv. Act, 1881, s. 6 (2). And see *Colegrave* v. *Dias Santos*, 2 B. & C. 76; *Hitchman* v. *Walton*, 4 M. & W. 409, and cases cited, 411; *Manning* v. *Bailey*, 2 Ex. 45; *Ex parte Lloyd*, 1 M. & A. 494; *Hare* v. *Horton*, 5 B. & Ad. 715; Sug. 33; *Wiltshear* v. *Cottrell*, 1 E. & B. 674; *Mather* v. *Fraser*, 2 K. & J. 536; *Hutchinson* v. *Kay*, 23 B. 413; *Haley* v. *Hammersley*, 3 D. F. & J. 587; *Boyd* v. *Shorrock*, 5 Eq. 72; *Turner* v. *Cameron*, L. R. 5 Q. B. 307, and *vide post*, p. 257 *et seq.*, as to valuation, and *post*, p. 606 *et seq.*, as to fixtures.

(*b*) Sug. 32. See *Higginson* v. *Clowes*, 15 V. 516.

(*c*) *Higginson* v. *Clowes*, *suprà*.

(*d*) Woodfall, 616.

(*e*) *Aubrey* v. *Fisher*, 10 Ea. 446.

(*f*) *Duke of Chandos* v. *Talbot*, 2 P. W. 606; see Craig, 11 *et seq.*

(*g*) *Foster* v. *Leonard*, Cro. Eliz. 1. As to what are and what are not

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Timber-like trees.

would seem not to be timber: if sound, however, they may be timber by local custom. A grant of "timber and timber-like trees" includes not only ordinary timber, and such trees as by local custom are considered timber, but even "thinnings," and the right of determining what are proper thinnings (*h*); so also it would seem to include sound pollards (*i*). An exception in a lease of "all timber and other trees, but not the annual fruit thereof," would seem not to include garden or orchard fruit trees, unless by local custom (*k*); the term "fruit" being considered to refer to the mast of timber trees.

Timber must be paid for under conditions, although purchaser may have no right to fell it.

Where, on the sale of intermixed freehold and copyhold land, it was provided, that the purchaser should not be entitled to have the quantities or boundaries of the two tenures distinguished, and he was to pay a specified sum for the timber, this was held to bind him to the purchase without an abatement, although the boundaries not being distinguishable, he could not fell a single tree. And in another case, arising under the same conditions, there was a like decision, although the entire lot was shown to be copyhold: the Court holding that the contract was entire, and that there was often much value and enjoyment in the possession of trees apart from their selling value as timber (*l*).

Misdescription.

It is a common condition, upon a sale by auction, and often upon a sale by private contract, that any misdescription, mistake, or error in the particulars, either way, shall not avoid the sale, but shall be the subject of compensation: and the condition usually proceeds to fix the mode in which the amount of compensation shall be settled (*m*).

What it extends to.

It has been held that such a condition, so far as it affects

timber trees, see *Honywood* v. *Honywood*, 18 Eq. 306; *Dunn* v. *Bryan*, 7 I. R. Eq. 143.

(*h*) *Gordon* v. *Woodford*, 27 B. 603.

(*i*) *Rabbett* v. *Raikes*, Woodfall, 617; and see 2 P. W. 606.

(*k*) *Bullen* v. *Denning*, 5 B. & C. 842.

(*l*) *Crosse* v. *Lawrence*, and *Crosse* v. *Keene*, 9 Ha. 462, 469; compare *Dawson* v. *Brinckman*, 3 M. & G. 53.

(*m*) See this condition discussed, *post*, p. 740. As to its effect after completion, see *post*, p. 904.

the vendor's right to specific performance, must be taken to contemplate and provide for *only* such misdescription, mistake, or error, as, in the absence of the condition, would be a ground for avoiding the contract (*n*); but, notwithstanding the condition, the misstatement, if wilful or designed, as it amounts to fraud, will, even at Law, render the contract voidable at the option of the purchaser: and, if it arise simply from negligence, Equity will refuse a specific performance at the suit of the vendor, if the error be not a fair subject for compensation (*o*).

Misdescription on material point.

In the absence of any condition, where there was a *bonâ fide* mistake in a matter essential to the contract, an estate being inadvertently stated to contain 21,750 acres, whereas it contained only half that quantity (*p*), the Court refused even the purchaser's suit for specific performance, holding it not a case for compensation, but for avoiding the contract altogether. At Law, cases have occurred, in which the opinion was entertained that, however gross the negligence, the purchaser is bound, if there be no fraud (*q*); but this opinion has not been followed (*r*): and the rule, both at Law and in Equity, seems now to depend on the principle that the Court will not make a new contract by compelling a purchaser to take the property with compensation when it is substantially different from what he was induced by the representations made to him, whether fraudulent or not, to believe that he was purchasing. In such a case the contract will be set aside

(*n*) *Leslie* v. *Tompson*, 9 Ha. 273; and see and consider *Hay* v. *Smithies*, 22 B. 510. In *Orange* to *Wright*, 54 L. J. Ch. 590, and *Bourne* v. *London Land Co.*, W. N. 1885, 109, Bacon, V.-C., refused the vendor the benefit of the condition, which was in the ordinary form that compensation should be given or allowed.

(*o*) Sug. 28. *Heywood* v. *Mallalieu*, 25 Ch. D. 357; Fry, ss. 1204 *et seq.* And see *Re Terry and White*, 32 Ch. D. 14, 28.

(*p*) *Earl of Durham* v. *Legard*, 34 B. 611; and see *Price* v. *North*, 2 Y. & C. 620, where, however, there was a condition for compensation; but see *Cordingley* v. *Cheeseborough*, 4 D. F. & J. 379; *McKenzie* v. *Hesketh*, 7 Ch. D. 675; and *English* v. *Murray*, 49 L. T. 35.

(*q*) *Wright* v. *Wilson*, 1 M. & R. 207; and see *Mills* v. *Oddy*, 6 C. & P. 728.

(*r*) Sug. 31. And see *Flight* v. *Booth*, 1 Bing. N. C. 370, 377. See *White* v. *Cuddon*, 8 C. & F. 766.

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in toto (s). But where the misdescription is as to a comparatively small and unimportant part of the property purchased, specific performance will be decreed, at the instance of the vendor, subject to compensation (s).

Or caused by gross negligence.

And where a vendor, who has the means of knowledge, and is bound to use due diligence, misdescribes his property in any important particular, it seems probable that the facts would in themselves be deemed conclusive evidence of a fraudulent intention (t): *e.g.*, a statement that the estate was about one mile from Horsham, when in fact it was upwards of three miles distant (u); and, in another case, a material misstatement, upon the sale of a house, as to the amount of the ground rent (x); and, in a later case, a description of dilapidated property, as "good and substantial but unfinished buildings" (y), seem to have been considered, at Law, to be, in their very nature, fraudulent.

Purchaser bound although misled by a correct and *bonâ fide* description.

But a sale of property merely by its usual and known description, without alteration, addition, or comment, will bind the purchaser, although such description may in fact accidentally mislead him: for instance, where a house long known and rated as No. 39, Regency Square, Brighton, was sold in London by auction by that description, and the purchaser bought it without previous inquiry, and then found that it was not actually in the square, but in a side street, commanding no sea view, and was a smaller house than the houses in the square, he was held by Sir James Parker, V.-C., to his bargain (z).

(s) *Torrance* v. *Bolton*, 8 Ch. 118; *Gardner* v. *Tate*, 10 I. R. C. L. 460; *Arnold* v. *Arnold*, 14 Ch. D. 270; *Pulsford* v. *Richards*, 17 B. 96; *Swaisland* v. *Dearsley*, 29 B. 430; and see notes to *Seton* v. *Slade*, 2 Wh. & T. L. C., and *post*, p. 1205.

(t) See Sug. 23 *et seq.*; *Brownlie* v. *Campbell*, 5 Ap. Ca. 925.

(u) *Duke of Norfolk* v. *Worthy*, 1 Camp. 337.

(x) *Mills* v. *Oddy*, 6 C. & P. 728.

(y) *Robinson* v. *Musgrove*, 8 C. & P. 469; *Loyes* v. *Rutherford*, Sug. 331; but, in general, a misstatement as to the state of repairs would seem to be a matter for compensation in Equity; *Dyer* v. *Hargrave*, 10 V. 505, 508.

(z) *White* v. *Bradshaw*, 16 Jur. 738.

Remarks on *White* v. *Bradshaw*.

In this case there was that degree of apparent hardship and mistake which might, without much difficulty, have induced the Court to decline to exercise its discretionary jurisdiction: but the decision, it is submitted, was correct. It was, no doubt, a hardship upon the purchaser to be obliged to take property of a less valuable kind than that which he fancied he was buying; but it might have been an equal or greater hardship on the vendor to throw the property back upon his hands, and so to deprive him of the advantage of those *bonâ fide* biddings at the auction, which immediately preceded the bidding upon which the house was knocked down to the purchaser. If a man chooses to enter a public sale room, and to bid for property without previous inquiry, and therefore evidently not with a view to personal occupation, but as a mere speculative investment, relying on his own imperfect knowledge or recollection of its particular features, and then finds that he has made a mistake, all that can be said is, "*qui vult decipi, decipiatur.*" If, however, the advertisement or particulars had contained any reference to Regency Square as possessing those peculiar advantages—such as a sea view—which, although enjoyed by the houses generally, were not enjoyed by No. 39 in particular, such reference, although strictly correct in fact, would probably have been held to savour sufficiently of deception to deprive the vendor of the assistance of a Court of Equity.

Stanton v. *Tattersall* distinguished.

Where a house known as No. 58, Pall Mall, but which in fact was built at the back of No. 57, and communicated with the street merely by a passage, was sold by auction, not merely as "No. 58, Pall Mall," but as "No. 58, *on the north side of* Pall Mall, *opposite Marlborough House*," the Court held the case to be one of misdescription, and not to fall within the authority of the Regency Square case (*a*): and the cases seem to be distinguishable on this ground, viz., that in the former there was a mere description of the property in those terms in which alone it could be properly described; whereas, in the

(*a*) *Stanton* v. *Tattersall*, 1 S. & G. 529.

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latter, the ordinary description was so amplified, as apparently to involve an assertion by the vendor that the premises actually occupied a specified desirable locality.

So if he test accuracy of particulars.

If the intending purchaser do not rely upon the particulars or statements of the vendor, but examine the property in person or by his agents, he cannot, in the absence of direct fraud, contend that he is deceived by the representations of the vendor as to any point upon which he has thus tested their accuracy (*b*); but if the misrepresentation be of such a nature as not to be apparent on a personal inspection, and the purchaser relies upon it, the mere fact of his having examined the property does not necessarily make the contract binding upon him (*c*); nor is it any defence to an action to rescind a contract on the ground of misrepresentation that the purchaser might with reasonable diligence have ascertained that the statements were untrue (*d*).

Cases of material misdescription.

It may, however, be collected from the cases at Law and in Equity, that, independently of fraud, and on the mere ground of the materiality of the misdescription, the usual condition as to compensation will not entitle the vendor to enforce the contract against an unwilling purchaser (*e*) in the following cases, viz.:—

Where property is of different nature;

1st. Where the property is not of the same description as it appears to be in the particulars; as where long leasehold is described as freehold (*f*); or copyhold is described as freehold (*g*): unless, by reason of the fine, &c., being fixed and nominal, and the right to minerals and timber being in the tenant, the customary tenure is in fact equivalent to free-

(*b*) See *Attwood* v. *Small*, 6 C. & F. 232; see the judgment in *Clapham* v. *Shillito*, 7 B. 149; and *Jennings* v. *Broughton*, 5 D. M. & G. 126.

(*c*) *Denny* v. *Hancock*, 6 Ch. 1; *Brewer* v. *Brown*, 28 Ch. D. 309.

(*d*) *Redgrave* v. *Hurd*, 20 Ch. D. 1.

(*e*) As to the rights of a purchaser under such a condition, see *post*, p. 740.

(*f*) See and consider *Browne* v. *Fenton*, 14 Ves. 144.

(*g*) *Ayles* v. *Cox*, 16 B. 23; *Upperton* v. *Nickolson*, 6 Ch. 436; and *vide post*, p. 1199.

hold (*h*); or where land which was formerly copyhold and has been enfranchised under the Enfranchisement Acts but remains subject to the rights of the lord in respect of minerals, is described as freehold (*i*); or where an underlease is sold as an original lease (*j*); or as where, upon the sale of an estate let on lease at a rack rent, such rent is described as a ground rent (*k*); or where the occupation rent is overstated, or so stated as to mislead (*l*); or what is described as a freehold ground rent is in fact only a sum in gross secured by personal covenant (*m*); or as where a house, composed externally partly of brick and partly of timber and lath and plaster, is described as a brick-built house (*n*).

or not identical;

2ndly. Where the property, as described, is not identical with that intended to be sold: as when a vendor, intending to sell No. 2 in a street, described it as No. 4, the purchaser, although No. 2 was the same description of house as, and in better repair than, No. 4, recovered his deposit at law (*o*).

or material part of it is wanting, or has no title;

3rdly. Where a material part of the property described has no existence, or cannot be found (*p*); or where no title can be shown to it; as when, upon the sale of a leasehold

(*h*) *Price* v. *Macaulay*, 2 D. M. & G. 339; and in such cases the effect of the Copyhold Enfranchisement Act, and the provision as to the reservation of minerals, must now be considered.

(*i*) *Upperton* v. *Nicholson*, *ubi suprà*. But distinguish *Kerr* v. *Pawson*, 25 B. 394, where on a contract for the sale of copyholds there was a stipulation that the vendor should procure their enfranchisement, and it was held that the purchaser must be taken to have known that on an enfranchisement the lord could reserve the minerals, and therefore that he could not rescind on the ground of such a reservation.

(*j*) *Madeley* v. *Booth*, 2 De G. & S. 718; *Law* v. *Urlwin*, 16 Si. 377; but see *Darlington* v. *Hamilton*, Kay, 550; *Bartlett* v. *Salmon*, 6 D. M. & G. 33; *Brumfit* v. *Morton*, 3 Jur. N. S. 1198; cf. *Hayford* v. *Criddle*, 22 B. 477; *Camberwell Building Society* v. *Halloway*, 13 Ch. D. 754; and *Flood* v. *Pritchard*, 40 L. T. 873.

(*k*) *Stewart* v. *Alliston*, 1 Mer. 26.

(*l*) *Dimmock* v. *Hallett*, 2 Ch. 21; but cf. *Davenport* v. *Charsley*, 34 W. R. 390.

(*m*) *Evans* v. *Robins*, 1 H. & C. 302.

(*n*) *Powell* v. *Doubble*, Sug. 29; and see *Arnold* v. *Arnold*, 14 Ch. D. 270; and *English* v. *Murray*, 49 L. T. 35.

(*o*) *Leach* v. *Mullett*, 3 C. & P. 115.

(*p*) *Robinson* v. *Musgrove*, 2 Mo. & R. 92.

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house and small yard adjoining, the yard was not included in the lease, but held from year to year at a separate rent (*q*); or where the vendors had only a title to an undivided part of a small but material portion of the property (*r*); or where a term, which in the particulars purports to have twenty-six years to run, has, in fact only nine (*s*).

or its due enjoyment is materially affected;

4thly. Where the misdescription is upon a point material to the due enjoyment of the property; as when, upon the sale of a lease of a house and shop, the particulars merely stated that the lease contained a restriction against certain specified trades being carried on upon the premises, whereas in fact several *other* trades were forbidden (*t*): so, also, where on the sale of the residue of a term of which twelve and a-half years were unexpired, no notice was taken of an option on the part of the lessors to determine the lease after five years had expired (*u*): so, also, where upon the sale of a piece of land described as "a first-rate building plot of ground," no notice was taken of a right of way passing over it (*v*), or of an underground watercourse which third parties had liberty to open, cleanse, and repair, making satisfaction for damage thereby occasioned (*x*): or where a right to use the kitchen of the tenement sold was not disclosed (*y*); or a covenant materially restricting the user of the land (*z*): or where a reservoir and waterworks were described as yielding a specified yearly rent exclusively of the land and buildings, and it appeared that this rent consisted of water rents paid by the occupiers of houses separated from the reservoir by property

(*q*) *Dobell* v. *Hutchinson*, 3 A. & E. 355.

(*r*) *Arnold* v. *Arnold*, 14 Ch. D. 270.

(*s*) *Nash* v. *Wooderson*, 33 W. R. 301.

(*t*) *Flight* v. *Booth*, 1 Bing. N. C. 370; see *Vignolles* v. *Bowen*, 12 Ir. Eq. R. 194, 196; *Stanley* v. *McGauran*, 11 L. R. Ir. 314.

(*u*) *Weston* v. *Savage*, 10 Ch. D. 736.

(*v*) *Dykes* v. *Blake*, 4 Bing. N. C. 463; and see *Gibson* v. *D'Este*, 2 Y. & C. C. C. 542.

(*x*) *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609. As to the importance of such an easement, see *Goodhart* v. *Hyett*, 25 Ch. D. 182.

(*y*) *Heywood* v. *Mallalieu*, 25 Ch. D. 357.

(*z*) *Nottingham Brick Co.* v. *Butler*, 16 Q. B. D. 778.

over which the vendors had merely a right of waterway under a yearly licence (*a*): or where a manufactory in a town abounding in springs was described as "well supplied with water," when in fact there was only an artificial supply from a waterworks company upon payment of a heavy annual rate (*b*): or where property is described as "freehold," and it is in fact subject to undisclosed restrictive covenants (*c*).

or where serious misdescription as to quantity;

5thly. Where the misdescription as to quantity is so serious that it is no longer a fit subject for compensation; as where the estate was said to contain "14 acres more or less," and it was found to contain 27 acres (*d*); or where the acreage was given as 21,750 acres, when it was in fact only half that quantity (*e*); and there may be cases where from the use intended to be made of the property by the purchaser, or from its being material to the enjoyment of other adjoining property of the purchaser (*f*), or from other circumstances, even a trifling deficiency in quantity, may not be a fit subject for compensation.

or amount of compensation cannot be estimated.

6thly. Where the misdescription is of such a nature that the amount of compensation cannot be estimated; as where, on the sale of a reversion, expectant on the decease of A. in case he should have no children, his age was described as 66 instead of 64 (*g*); or as where, on the sale of a wood, the particulars erroneously stated that the *average size* of the timber approached 50 feet, the *number* of trees not being stated (*h*); or as where the particulars stated the premises to be in the joint occupation of A. and B. as *lessees*, when in fact A. was only assignee of the lease, and B. was a mere

(*a*) *Price* v. *Macaulay*, 2 D. M. & G. 339.

(*b*) *Leyland* v. *Illingworth*, 2 D. F. & J. 248.

(*c*) See *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159; *Cato* v. *Thompson*, 9 Q. B. D. 616; *Ellis* v. *Rogers*, 29 Ch. D. 661.

(*d*) *Price* v. *North*, 2 Y. & C. 620.

(*e*) *Earl of Durham* v. *Legard*, 34 B. 611; but see *Cordingley* v. *Cheeseborough*, 4 D. F. & J. 379.

(*f*) *Arnold* v. *Arnold*, 14 Ch. D. 270.

(*g*) *Sherwood* v. *Robins*, M. & M. 194; and see *White* v. *Cuddon*, 8 C. & F. 792.

(*h*) *Lord Brooke* v. *Rounthwaite*, 5 Ha. 298.

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joint occupier (*i*); or as where the right to coal under the estate was shown to be in other parties, and no means existed of determining its value (*k*); or as where property was described as "now or late in the occupation of H. R. and others," and it was in fact subject to leases for lives at low rents which were not disclosed (*l*).

Action lies for breach of the condition.

The condition as to compensation usually provides that the amount shall be settled by arbitration; and, frequently, that any dispute arising under the contract shall be similarly referred. It has been held that an action lies for breach of such a stipulation (*m*).

Whether trustee should use it.

And it may be observed, that where the vendors are trustees they are not justified in allowing compensation for their own errors, and a Court of Equity has refused to act upon a clause to that effect in the conditions (*n*).

Condition that no compensation shall be allowed by the vendor.

Instead of the usual condition providing for compensation in the event of any omission or misdescription in the particulars, a condition is frequently inserted that in such a case no compensation shall be allowed by the vendor. In one case, where land was described as containing 1a. 2r. 8p., and the vendor showed a title to only 3r. 24p., it was held that, under such a condition, the purchaser was bound to complete without compensation (*o*). So where, by an unintentional error, land was stated to contain 7,683 square yards, but in fact contained only 4,350 square yards, and the purchaser, notwithstanding the conditions, insisted on compensation, though the vendor offered to vacate the sale, specific performance was decreed at the suit of the purchaser, but upon payment of the

(*i*) *Ridgway* v. *Gray*, 1 M. & G. 109; but see *Grissell* v. *Peto*, 2 S. & G. 39; *Farebrother* v. *Gibson*, 1 D. & J. 603.

(*k*) *Smithson* v. *Powell*, 20 L. T. O. S. 104.

(*l*) *Hughes* v. *Jones*, 3 D. F. & J. 307.

(*m*) *Livingston* v. *Ralli*, 5 E. & B. 132.

(*n*) *White* v. *Cuddon*, 8 C. & F. 766. But see *Hill* v. *Buckley*, 17 V. 394; *Hobson* v. *Bell*, 2 B. 17; *Dunn* v. *Flood*, 28 Ch. D. 586, 591.

(*o*) *Nicoll* v. *Chambers*, 11 C. B. 996; and see *Lethbridge* v. *Kirkman*, 2 Jur. N. S. 372.

Condition that no compensation shall be allowed either by vendor or purchaser.

whole of the purchase-money and costs (*p*). But such a condition, if relied on by a vendor seeking to enforce specific performance, can be held to apply only to trivial errors; and not to preclude a purchaser from the right to compensation for a material deficiency in the quantity stated, as where the property was stated to contain 753 square yards, but in fact contained only 573 square yards (*q*); or from avoiding the contract where the misdescription is of such a nature as not to be a fit subject for compensation.

As to deeds and attested copies.

In the absence of stipulation, a vendor is bound to produce the originals of all deeds and other instruments necessary to verify the abstract (*r*), except copies of court rolls, and such instruments as are upon record (*s*), or have been lost (*t*) or destroyed; as respects all which he may verify his abstract by secondary evidence (*u*): he must, however, as a general rule, in order to render copies admissible in evidence, prove the execution, and delivery of the originals (*x*); which, when deeds are lost and the witnesses are unknown, is often an insuperable difficulty. Formerly, the vendor, in the absence of stipulation, had to bear the cost of production, whether the documents were in his possession or not; but by the Conveyancing Act, 1881 (*y*), the expenses of the production and inspection of all

(*p*) *Cordingley* v. *Cheeseborough*, 4 D. F. & J. 379; *Re Terry and White*, 32 Ch. D. 14.

(*q*) *Whittemore* v. *Whittemore*, 8 Eq. 603.

(*r*) *Berry* v. *Young*, 2 Esp. 640, n.; Sug. 447.

(*s*) *Cooper* v. *Emery*, 1 Ph. 388. It seems doubtful whether the rule extends to deeds inrolled merely for safe custody, and not under any statutory provision; 9 Jarm. Conv. 10.

(*t*) *Harvey* v. *Phillips*, 2 Atk. 541; as to what is sufficient evidence of loss, see *Green* v. *Bailey*, 15 Si. 542; *Fitzwalter Peerage*, 10 C. & F. 953; *Hart* v. *Hart*, 1 Ha. 1; *Stubbs* v. *Sargon*, 4 B. 90; *Richards* v. *Lewis*, 11 C. B. 1035; *Reg.* v. *Saffron Hill*, 1 E. & B. 93; *Abbott* v. *Geraghty*, 6 Ir. Jur. 49.

(*u*) See as to a recital being under the circumstances sufficient secondary evidence of the recited deed, *Moulton* v. *Edmonds*, 1 D. F. & J. 246.

(*x*) *Bryant* v. *Bush*, 4 Rus. 1. See, however, as to this, *post*, p. 353.

(*y*) Sect. 3, sub-s. 6. This sub-section does not relieve the vendor from the duty to furnish a complete abstract of title; but only from the expense, when he has furnished a complete abstract, of producing documents not in his possession for the purpose merely of verifying it; *Johnson* to *Tustin*, 30 Ch. D. 42; *Re Moody and Yates*, *ib.* 344. It seems, too, that the sub-section only relates

Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, *not in the vendor's possession*, are thrown on the purchaser. When the sale is completed, the purchaser, if he cannot have the original title deeds, is entitled to a covenant to produce them, and, at his own expense (*z*), to attested copies of the originals (*a*): this right, however, does not seem to extend to old deeds not necessary to make a title (*b*); or to copies of court roll (*c*), or instruments on record, unless (as respects the covenant for production) they are in the vendor's possession or power (*d*); or to documents used merely as negative evidence (*e*); and now by the Vendor and Purchaser Act, 1874, in the completion of any contract of sale of *land* made after the 31st December, 1874, and subject to any stipulation to the contrary, the inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title, is not to be an objection to title, in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents (*f*). It is by no means clear what is meant by an "equitable right to production," or how such a right can be enforced, except, perhaps, against a holder of the deeds who took them with notice of the liability to produce them. The Act does not contain any definition of the term "land;" and this rule cannot, it is conceived, extend to a contract for sale of an incorporeal hereditament.

What documents the purchaser is entitled to have covenanted to be produced.

Statutory acknowledgments.

By the Conveyancing Act, 1881, an "acknowledgment" of right to production, the nature and effect of which are defined by sect. 9, is, in cases occurring after the 31st December, 1881, substituted for the old covenant for production. Such

to documents which the vendor has not in his possession, but of which he can procure production; and therefore, if there are any documents of which he cannot obtain production, he must specially protect himself; see Wolst. C. A. 24, 200.

(*z*) V. & P. Act, s. 2, sub-s. 4.

(*a*) *Boughton* v. *Jewell*, 15 V. 176.

(*b*) *Dare* v. *Tucker*, 6 V. 460.

(*c*) *Re Agg-Gardner*, 25 Ch. D. 600.

(*d*) *Vide post*, Ch. XIII. s. 7.

(*e*) See *Cooper* v. *Emery*, *suprà*; 1 Hayes' Conv. 573.

(*f*) 37 & 38 V. c. 78, s. 2, sub-s. 3.

an acknowledgment binds the person having possession of the documents to which it relates so long only as he has possession thereof. The obligation so imposed may be enforced, after request in writing, either by the person to whom the acknowledgment is given, or by any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under that person, or otherwise becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates; and, by the same section, a statutory undertaking is substituted for the ordinary covenant for safe custody (*g*). Such acknowledgment and undertaking may, it is conceived, be given by any person retaining possession of documents, whether as incident to the title to land or not.

At whose expense to be prepared.

Previously to the Vendor and Purchaser Act, the attested copies and deed of covenant had to be prepared at the expense of the vendor (*h*): if he wished to exclude, or to derogate from, the purchaser's rights in the above respects, he must do so clearly and explicitly in the conditions: but in one case a condition that all attested copies, &c., which the purchaser might require, "for the purpose of examination with, or verifying or proving the abstract, should be sought for and procured at his expense," was held to preclude him from requiring on completion attested copies of the title deeds at the vendor's expense (*i*). At Law, a condition that the deeds of covenant shall be procured *by*, and at the expense of, the purchaser, was held to throw upon him the risk of being unable to obtain them, the vendors having procured production of the deeds for the purpose of verification (*k*). But now, in cases falling under the Vendor and Purchaser Act, such covenants for production as the purchaser can and

(*g*) As to the nature of statutory acknowledgments, see *post*, p. 627.

(*h*) *Boughton* v. *Jewell*, 15 V. 176.

(*i*) *Abbott* v. *Darnell*, 2 Jur. N. S. 631; and see *Strong* v. *Strong*, 4 Jur. N. S. 943; *sed quære.*

(*k*) *Gabriel* v. *Smith*, 16 Q. B. 847; but cf. *Osborne* v. *Harvey*, 7 Jur. 229; *Cotton* v. *Scudamore*, 1 K. & J. 321.

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shall require are to be furnished at his expense; and the vendor is only to bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser (*l*). By sect. 3 (6) of the Conveyancing Act, 1881, the expense of making attested copies of documents is, in the absence of stipulation, thrown on the purchaser. Particular care to insert proper conditions as to deeds should be taken upon the sale of a part only of an estate in mortgage, when the purchase-money is not likely to pay off the incumbrance: a deposit of the deeds with some third party, for the joint benefit of the mortgagee and purchaser, will, if acquiesced in by the mortgagee, be the most eligible arrangement (*m*).

Provision as to deeds on sale of part of mortgaged estate.

Custody of deeds, on sale in lots.

On a sale in lots, it is generally requisite to provide for the ultimate custody of the deeds, which, in the absence of stipulation, go to the purchaser of the lot largest in value (*n*); or rather, it is conceived, to the purchaser whose aggregate purchase-money of land, held under the same title, amounts to the largest sum. If, however, there be any lot which may fairly be considered a principal lot, the purchaser of it is usually made to take the deeds and covenant for their production: where the intention is that they shall belong to the purchaser whose purchase-money amounts to the largest sum, it may occasionally be well to provide for the contingency of the two largest purchasers buying to an equal amount. The expression "largest lot" in such a condition means the lot of largest superficial area (*n*). Under a condition giving the deeds to the purchaser of the "largest lot," he is of course entitled to them as against the purchaser of lots of a larger aggregate area (*o*). Such a condition fixes, by its acreage, though not by name, the lot which is to carry with it the right to the deeds. When the vendor retains any part of the estate to which the deeds relate, he

(*l*) 37 & 38 V. c. 78, s. 2, sub-s. 4.

(*m*) Sug. 435.

(*n*) See *Griffiths* v. *Hatchard*, 1 K. & J. 19.

(*o*) *Scott* v. *Jackman*, 21 B. 110, following a decision of Lord Eldon in *Kinnaird* v. *Christie*, *ib.* 111; and *vide post*, p. 1348.

is now, subject to any stipulation to the contrary in the contract, entitled to retain them (*p*).

Title and evidence of title.

Every condition intended to relieve the vendor from his *primâ facie* (*q*) liability to deduce a marketable title, and verify the abstract by proper evidence, must be expressed in plain and unambiguous language (*r*).

Production of deeds.

For instance, a condition that he shall not be bound to produce any original deed or other document than those in his possession and set forth in the abstract, was held not to relieve him from his liability to verify the abstract; for *non constat* that, because he has only certain specified deeds in his possession, he cannot prove his title (*s*). But in one case, of more than doubtful authority, where the contract provided that the purchaser should admit the vendor's heirship to the last owner upon a copy of his pedigree, and should not require any further evidence, the purchaser was forced to accept the title, although the copy of the pedigree failed to trace the heirship (*t*).

Must verify abstract *aliunde*.

Against production of lessor's title.

So, on an agreement by a vendor to sell a lease "as he held the same" for twenty-eight years, a condition that the

(*p*) 37 & 38 V. c. 78, s. 2, sub-s. 5, and *vide post*, Ch. XIII. s. 7.

(*q*) *Souter* v. *Drake*, 5 B. & Ad. 992; *Doe* v. *Stanion*, 1 M. & W. 695, 701; *Ogilvie* v. *Foljambe*, 3 Mer. 53, 64; *Hall* v. *Betty*, 4 Man. & G. 410; *Worthington* v. *Warrington*, 5 C. B. 636; *aliter*, as regards goods, *Morley* v. *Attenborough*, 3 Ex. 500, see 514; but see *Simms* v. *Marryat*, 17 Q. B. 281. The nature of the subject-matter of the contract may vary the rule, as on an agreement to buy the benefit of a proposal for a lease, *Baxter* v. *Conolly*, 1 J. & W. 576; and see as to restrictive conditions, *Lethbridge* v. *Kirkman*, 2 Jur. N. S. 372; *Stronge* v. *Hawkes*, *ib.* 388; *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159; *Ellis* v. *Rogers*, 29 Ch. D. 661; *Nottingham Brick Co.* v. *Butler*, 16 Q. B. D. 778.

(*r*) *Osborne* v. *Harvey*, 7 Jur. 229; and see *Clarke* v. *Faux*, 3 Rus. 320; and *Morris* v. *Kearsley*, 2 Y. & C. 139; *Re Marsh and Earl Granville*, 24 Ch. D. 11, 17.

(*s*) *Southby* v. *Hutt*, 2 M. & C. 207; and see *Dick* v. *Donald*, 1 Bli. N. S. 655; *Osborne* v. *Harvey*, *suprà*. The effect of sect. 3 (6) of the Conveyancing Act, 1881, is not in any way to abridge the liability of a vendor to verify his abstract, but merely to alter the incidence of the expense of so doing, *Johnson* to *Tustin*, 30 Ch. D. 42; *Re Moody and Yates*, *ib.* 344.

(*t*) *Nash* v. *Browne*, 9 Jur. N. S. 431; *sed quære*.

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On sale of an underlease;

purchaser should not require the lessor's title, would not, it appears, prevent him from showing that the lease was invalid (*u*). So on a sale of an underlease, a condition that "no requisition or inquiry shall be made respecting the title of the lessor or his superior landlord, or his right to grant such underlease," was held not to preclude the purchaser from objecting that the lessor, having mortgaged the premises, had no power to grant the underlease (*x*).

where simply described as a lease.

So, upon a sale of an underlease, described simply as a lease, a stipulation that the vendor should not be called upon to prove his title, was held to be inoperative when it appeared that the original lease comprised other premises, and contained covenants embracing both properties and exposing the purchaser to eviction through the default of the holder of such other premises (*y*). And where the interest, being an underlease, was offered for sale without intimation of the fact, the defect was held fatal, although there was a condition that the purchaser should not call for the lessor's title (*z*), but this doctrine has been impugned in later cases (*a*).

So where leaseholds were stated to be sold "by order of the executors," but were in fact sold by the administrator *de bonis non* of the testator *durante absentiâ* of his next of

(*u*) See Sug. 369, and see judgment in *Shepherd* v. *Keatley*, 1 C. M. & R. 127, 128, disapproving of *Spratt* v. *Jeffery*, 5 Man. & R. 188; see *Wheeler* v. *Wright*, 7 M. & W. 359, 362; *Duke* v. *Barnett*, 2 Coll. 337; and *Hume* v. *Bentley*, 5 De G. & S. 525; *Musgrave* v. *McCullagh*, 14 Ir. Ch. R. 496; *Hume* v. *Pocock*, 1 Ch. 379; *Jones* v. *Clifford*, 3 Ch. D. 779; *Re Banister*, 12 Ch. D. 131.

(*x*) *Waddell* v. *Wolfe*, L. R. 9 Q. B. 515, and *vide post*, p. 173; and 37 & 38 V. c. 78, s. 2; Conv. Act, 1881, s. 3 (1). And sect. 18 of the latter act would now, unless excluded, render this objection inapplicable.

(*y*) *Blake* v. *Phinn*, 3 C. B. 976; see *Fildes* v. *Hooker*, 3 Mad. 193; *Darlington* v. *Hamilton*, Kay, 550.

(*z*) *Madeley* v. *Booth*, 2 De G. & S. 718; see also *Brumfit* v. *Morton*, 3 Jur. N. S. 1198.

(*a*) See *Darlington* v. *Hamilton*, Kay, 557; *Bartlett* v. *Salmon*, 1 Jur. N. S. 277, reversed, 6 D. M. & G. 33; *Camberwell and South London Building Society* v. *Holloway*, 13 Ch. D. 754; and *Flood* v. *Pritchard*, 40 L. T. 873.

kin, it was held that the title could not be forced upon the purchaser (*b*).

For concurrence of parties who prove to be incompetent.

So where the conditions stated that the property was settled on A. for life, with remainder to her children, with a trust for sale on her death, and that, the sale being in her lifetime, the children, their assigns or trustees, should join in the conveyance, and it appeared that the children had settled their shares, and their trustees had no power to concur, the purchaser recovered his deposit (*c*): and an express agreement to make a good title has, at Law, been held to bind the vendor to remove defects in title, which were known to both parties at the date of the contract, and which were in their nature removable (*d*).

Where contract not completed.

So where on a sale of freehold property it was a condition that the title to the beneficial ownership should commence with the will of A. C., and the purchaser was bound to assume that A. C. was, at the date of his death, beneficially entitled in fee, when he had, in fact, only a contract for purchase, which was not completed till many years afterwards, it was held that the purchaser was not bound by the condition (*e*).

Mistake as distinguished from misrepresentation.

And even where there is no misrepresentation, but only a common mistake as to the title appearing on the conditions, not only will specific performance be refused (*ee*), but if the contract has been completed the purchaser may recover his purchase-money as paid under mistake of fact (*f*).

(*b*) *Webb* v. *Kirby*, 7 D. M. & G. 376; and see, too, *Cruse* v. *Nowell*, 2 Jur. N. S. 536, where the condition did not point directly to the objection.

(*c*) *Mosley* v. *Hide*, 17 Q. B. 91.

(*d*) *Barnett* v. *Wheeler*, 7 M. & W. 364; *Cato* v. *Thompson*, 9 Q. B. D. 616; and see now the means of getting rid of incumbrances afforded by the Conv. Act, 1881, s. 5; *Re N. R. Co.* v. *Sanderson*, 25 Ch. D. 788.

(*e*) *Harnett* v. *Baker*, 20 Eq. 50; and see *Boyd* v. *Dickson*, 10 I. R. Eq. 239.

(*ee*) *Post*, p. 1153 *et seq.*

(*f*) *Jones* v. *Clifford*, 3 Ch. D. 779; cf. *Cooper* v. *Phibbs*, L. R. 2 H. L. 149; and see *post*, p. 907 *et seq.*

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As to recitals being evidence.

In the absence of express stipulation, the common condition (*g*) as to recitals being evidence would not, it is conceived, bind the purchaser to accept recitals as evidence of conclusions of law (*h*): nor would it seem to preclude the purchaser from proving *aliunde* the inaccuracy of the recitals as to matters of fact. Whether this would be precluded even by the expression "conclusive evidence," may be doubtful; at any rate such a condition would not avail, if it contained any misrepresentation upon the point in question (*i*).

As to deeds twenty years old being evidence.

The conditions usually provide that deeds more than twenty years old shall be conclusive evidence of everything stated, noticed, assumed, or implied therein. Where the condition was that they should be evidence of everything recited or stated, it was held that, in order to bind a purchaser, the statement ought to be something alleged by way of direct recital, and not mere matter of inference (*k*). Of course such a condition would not be sufficient to make sub-recitals evidence. And now, in the completion of any contract for the sale of *land*, made after the 31st December, 1874, and subject to any stipulation to the contrary in the contract, recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations twenty years old at the date of the contract, are, unless and except so far as they shall be proved to be inaccurate, to be taken to be sufficient evidence of the truth of such facts, matters, and descriptions (*l*); but this rule, which does not bind the purchaser to accept mere matters of inference, is less comprehensive than, and in practice is not likely to supersede, the ordinary condition.

As to statutory declara-

Where the evidence of some fact on which the title

(*g*) See sect. 3 (3) of the Conv. Act, 1881.

(*h*) 9 Jarm. Conv. 4; *Goold* v. *White*, Kay, 683.

(*i*) *Drysdale* v. *Mace*, 5 D. M. & G. 103.

(*k*) *Buchanan* v. *Poppleton*, 4 C. B. N. S. 40.

(*l*) 37 & 38 V. c. 78, s. 2. See as to this section, *Bolton* v. *London School Board*, 7 Ch. D. 766.

tions being accepted as evidence.

depends is insufficient, and there are no better means of verification, it is frequently provided that the purchaser shall be satisfied with a statutory declaration confirmatory of the title in the point in which it is defective. If such declaration has been actually made, it should be referred to and identified as a subsisting instrument. If it has yet to be made, its proposed effect should be clearly stated; or, which is better, a draft should be referred to: and, if practicable, the proposed declarant should be specified; a clause being added, providing for the substitution of some other competent person in the event of the death, refusal, or incapacity of the person so specified: and there should be no question as to the competency of the declarant to speak to the facts which he alleges (*m*). Where, as frequently happens, the declarant states what he cannot possibly know except by hearsay, his declaration is of small value as evidence.

Vendor bound to answer relevant questions.

And the author conceived it to be a general rule, and it is one which he constantly enforced in practice, that a vendor, to the best of his information, is bound to answer all relevant questions put to him in respect to the property which he has contracted to sell, or the title thereto (*n*); unless the *primâ facie* liability in this respect is expressly negatived by the conditions: and that a condition that a purchaser shall be satisfied with certain specified evidence merely provides for an assumed absence of better evidence; and does not enable the vendor to keep back such better evidence if he actually has it, or to withhold any information which may be in his possession.

As to declaration of possession in proof of identity of

The following point often arises in practice. A large estate in the same locality has been acquired from time to time, and is held under a variety of early titles. Up-

(*m*) See as to this, *Nott* v. *Riccard*, 21 B. 307.

(*n*) It is conceived that the principle laid down in the well-known case of *Ford* v. *Hill*, 10 Ch. D. 365, decides nothing more than that every question must be specific.

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lands held under several titles.

wards of twenty years ago the whole was put into settlement, and has been since held under such settlement. It is now put up for sale in numerous lots, and it is impossible to identify the modern with the ancient general descriptions. The vendors accordingly sell under a mere condition that evidence of twenty years' possession shall be evidence of identity of parcels. The vendor's solicitor then, almost at random, as respects each particular lot, selects from the early titles such a title as he considers to be appropriate; and supplements it by the general settlement, and the subsequent assurances (if any). The purchaser calls for evidence of identity, and is offered a declaration of twenty years' possession. Now such a declaration, referring as it does merely to a possession subsequent to the union of the titles, obviously cannot show, or tend to show, that the lot is held under one rather than another of those several prior titles, the assurances in which are expressed in terms capable of comprising such lot. The declaration and condition can, it is submitted, only bind the purchaser to assume that the lot passed under some one or more of the several possibly relevant prior titles; and as the vendor cannot show which in particular is the true prior title, it may be well contended that he is bound to abstract *all*. Such a liability might in many cases be very serious; and should, where circumstances require it, be guarded against by a condition more stringent than the one in ordinary use. It must also be borne in mind that in a case such as is above supposed the question, under which of several titles a particular lot is held, affects it with the aggregate imperfections of all such prior titles (*o*).

Conditions, if explicit will bind purchaser.

But though mere general or doubtful expressions, suggesting, but not specifying, a flaw in the vendor's title, may not bind the purchaser (*p*), he is bound by a clear (*q*) stipulation

(*o*) See 1 K. & E. 245, for form of condition.

(*p*) See *Edwards* v. *Wickwar*, 1 Eq. 68; *Re Bannister*, 12 Ch. D. 131.

(*q*) *Seaton* v. *Mapp*, 2 Coll. 556, 562; *Forster* v. *Hoggart*, 15 Q. B. 155; *Worthington* v. *Warrington*, 5 C. B. 636; *Lethbridge* v. *Kirkman*, 2 Jur. N. S. 372.

as to title (*r*), *e. g.*, an agreement by assignees of a bankrupt to sell his estate, "under such title as he recently held the same, an abstract of which may be seen" (*s*); or that the purchaser should only have the receipt and conveyance of A. (an equitable mortgagee), and the assignees (*t*); an agreement by ordinary vendors to convey "such title as they have received from A. and B." (*u*); and a condition that the purchaser should accept the vendor's title "without dispute" (*x*), or should accept "such title as the vendor has" (*y*): so, an agreement that the lessor's title shall "not be inquired into," has been held to preclude objections arising on the face of documents procured by the purchaser *aliunde* (*z*); so where a breach of trust, invalidating the title, was clearly stated in the conditions (*a*); so where a purchaser was pre-

(*r*) But see *Darlington* v. *Hamilton*, Kay, 558; *infrà*, n. (*z*), *sed qu.*

(*s*) *Freme* v. *Wright*, 4 Mad. 364; *Blenkhorn* v. *Penrose*, 29 W. R. 237.

(*t*) *Groom* v. *Booth*, 1 Dr. 548.

(*u*) *Wilmot* v. *Wilkinson*, 6 B. & C. 506; *Ashworth* v. *Mounsey*, 9 Ex. 175.

(*x*) *Duke* v. *Barnett*, 2 Coll. 337; and *Molloy* v. *Sterne*, 1 D. & Wal. 585, agreement by A. to lease for "the longest term he could grant;" and see *Anderson* v. *Higgins*, 1 J. & L. 718; and Lord St. Leonards' remarks, V. & P. 340, on *Cattell* v. *Corrall*, 3 Y. & C. 413; and see *Corrall* v. *Cattell*, 4 M. & W. 734; but see also *Smith* v. *Ellis*, 14 Jur. 682.

(*y*) *Keyse* v. *Heydon*, 20 L. T. O. S. 244; *Tweed* v. *Mills*, L. R. 1 C. P. 39.

(*z*) *Hume* v. *Bentley*, 5 De G. & S. 520; see, however, *Darlington* v. *Hamilton*, Kay, 550; but there, the stipulation in the condition did not preclude "inquiry" in other quarters; it was merely directed against requisitions on the vendor to prove the title. And see comments on *Hume* v. *Bentley*, and *Darlington* v. *Hamilton* in *Waddell* v. *Wolfe*, L. R. 9 Q. B. 515, where the word "inquiry" was treated as convertible with "requisition," and the condition was held not to preclude inquiry *aliunde*. The doctrine laid down in the second paragraph of the judgment in *Darlington* v. *Hamilton* that whatever may be the terms of the condition of sale, if the purchaser obtain information *aliunde* that the title of the vendor is not clear and distinct, he has a right to insist upon the objection, appears to be too broadly stated. In *Smith* v. *Robinson*, 13 Ch. D. 148, a condition that the title should commence with a deed dated the 30th December, 1867, and that no earlier or other title should be required or inquired into, was held not to preclude the purchaser from insisting on an objection to the prior title, which was not discovered through any inquiry made by him, but was accidentally disclosed by the vendor. See also *Else* v. *Else*, 13 Eq. 196; *Jones* v. *Clifford*, 3 Ch. D. 779; *Re Banister*, 12 Ch. D. 131; *Re Davys to Saurin*, 17 L. R. Ir. 334.

(*a*) *Micholls* v. *Corbett*, 3 D. J. & S. 18.

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cluded from objecting that no payment had been made for twenty years of a rent the subject of sale (*b*); so, a condition binding a purchaser, if he considered the legal estate outstanding, to be at the expense of getting it in, was held to throw on him the risk of making out in whom the legal estate was vested (*c*); so, on a sale of land which had been superfluous land of a railway company, a stipulation that the purchaser should assume and admit that everything (if anything were necessary) was done by the company to enable them to sell the land as superfluous land, was held to preclude the purchaser from objecting *aliunde* that the adjoining owners had not waived their right of pre-emption (*d*). And, as a general rule, if facts are fully disclosed, their legal effect need not be stated (*e*).

Conditions when misleading.

It may be laid down as a general principle that a condition is bad as misleading (1) if it requires the purchaser to assume what the vendor knows to be false; or, (2) if it affirms that the state of the title is not accurately known to the vendor when in fact it is known. And it must be borne in mind that a vendor is not at liberty to require a purchaser to assume as the root of his title that which documents within his possession show not to be the fact, even though these documents may show a title perfectly good on another ground (*f*).

Right to call for title may be excluded by special circumstances.

Even the special circumstances of the contract, independently of express stipulation, may show that no title was intended to be produced or called for (*g*); and in considering whether an objection to the title is sufficiently brought before

(*b*) *Hanks* v. *Palling*, 6 E. & B. 659.

(*c*) *Sheerness W. W. Co.* v. *Polson*, 3 D. F. & J. 36. But conditions on the sale of copyholds that the vendors should give such title as they then possessed, and that the purchaser should prepare his own conveyance at his own expense, were held not to relieve the vendors from the obligation to get in the legal estate and pay the necessary fines; *Whiteley* v. *Taylor*, 35 L. T. 187.

(*d*) *Best* v. *Hamand*, 12 Ch. D. 1.

(*e*) *Smith* v. *Watts*, 4 Dr. 338.

(*f*) *Re Banister*, 12 Ch. D. 131.

(*g*) See *Richardson* v. *Eyton*, 2 D. M. & G. 79, 88; *Godson* v. *Turner*, 15 B. 46.

the purchaser's notice by the conditions of sale, the fact of his being an able and experienced member of the legal profession is not immaterial (*h*); and a purchaser must in all cases be content to take only such a title as the conditions on their face purport to give him. Thus, if the conditions clearly show that only a possessory title is to be given, the purchaser cannot ask for a marketable one (*i*).

Condition when not conclusive.

Where a vendor of leaseholds agreed to produce a good and marketable title, commencing from the freeholder, but no title was to be called for prior to the lease from A. B. to the vendor, and it appeared that the agreement for this lease had been mortgaged, and otherwise dealt with, it was held that the vendor, as plaintiff, could not refuse to produce this equitable title (*k*). And it has been held that, if instead of simply stating the material facts, and then stipulating that the purchaser shall accept such title and interest as the detailed circumstances confer on the vendor, and no other,—in which case the purchaser would probably be bound to take the title, whatever it might be—the conditions go on to state, not as a conclusion of Law from the narrated circumstances, but as a positive and distinct fact, that the vendor has a right to sell the property, the purchaser, inasmuch as such right may have arisen from separate and independent sources, is entitled to require the right to be proved (*l*).

That abstract shall commence with specified document.

A condition that the abstract shall commence with a specified document, the peculiarities or deficiencies of which as a root of title are not noticed, seems merely to preclude the purchaser from objecting to the title as commencing at too recent a period; so that if the instrument in question is apparently an imperfect root of title, he may require the imperfection to be remedied: so, a mere condition against production of the earlier title would not, it is conceived,

(*h*) See *Minet* v. *Leman*, 7 D. M. & G. 340.

(*i*) *Re Banister*, 12 Ch. D. 131; *Smith* v. *Robinson*, 13 Ch. D. 148; *Rosenberg* v. *Cook*, 8 Q. B. D. 162.

(*k*) *Rhodes* v. *Ibbetson*, 4 D. M. & G. 787.

(*l*) See *Johnson* v. *Smiley*, 17 B. 233.

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preclude him from requiring the production of recited instruments which, as recited, appear to be of a suspicious character (*m*). An agreement to accept a possessory title merely points to the evidence by which it is to be supported, and the vendor is still bound to prove sixty (or now forty) years' possession (*n*).

Conveyancing Act, 1881, s. 3.

By sect. 3 (*o*) of the Conveyancing Act, 1881, the purchaser of any property is not, in the absence of stipulation to the contrary, to require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor is he to require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, inrolment, or otherwise. It must be carefully borne in mind in settling conditions that neither this provision, nor any condition to a like effect, modifies the general principle, that the Court will not compel a purchaser to take an estate with less than the ordinary title which the law gives him, unless the stipulation, on which the vendor relies for the purpose of excluding what would otherwise be the purchaser's legal right, is fair and explicit. And the test of its being fair and explicit is whether it discloses all facts

(*m*) See and consider *Sellick* v. *Trevor*, 11 M. & W. 722; *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159.

(*n*) *Douglas* v. *L. & N. W. R. Co.*, 3 K. & J. 173.

(*o*) Sub-s. 3.

within the knowledge of the vendor which are material to enable the purchaser to determine whether or not he will buy the property, subject to the stipulation limiting his right to the ordinary length of title (*p*). Accordingly, where a contract entered into in 1882, provided that the title should commence with an indenture dated the 18th October, 1845, and that the earlier title should not be investigated or objected to, and it appeared from the abstract that the indenture was a voluntary and revocable conveyance, it was held that the condition was misleading, and did not bind the purchaser (*q*).

Does not preclude objections.

Nor will a mere condition against production, except perhaps in a very special case (*r*), prevent a purchaser from investigating and objecting to the earlier title, if he have the collateral means of doing so (*s*): and, although bound to accept the title as it stands, he may yet require to be satisfied, to the best of the vendor's ability, as to what that title really is (*t*). So, although a purchaser be bound by the condition to accept certain specified evidence as sufficient proof of a material fact, he may yet require to be satisfied that the vendor has no better evidence in his possession; and may, it would seem, insist on a statutory declaration to that effect (*u*). In one case where A., for his own purposes, induced B. to buy from C., and shortly afterwards agreed to purchase from B., who was only to produce the title from C. to himself, A. was not allowed to prove *aliunde* that C. had no title (*x*).

(*p*) The sub-s has practically the same effect as the ordinary condition precluding enquiry into the earlier title, see sub-s. 11, and *Nottingham Brick Co.* v. *Butler*, 15 Q. B. D. 261, 272.

(*q*) *Re Marsh and Earl Granville*, 24 Ch. D. 11.

(*r*) *Hume* v. *Pocock*, 1 Ch. 379.

(*s*) *Shepherd* v. *Keatley*, 1 C. M. & R. 117. See observations on this case in *Darlington* v. *Hamilton*, Kay, 558, and *Waddell* v. *Wolfe*, L. R. 9 Q. B. 515; and see *Else* v. *Else*, 13 Eq. 196; *Harnett* v. *Baker*, 20 Eq. 50; *Nottingham Brick Co.* v. *Butler*, 16 Q. B. D. 778, *Re Davys to Saunn*, 17 L. R. Ir. 334; *King* v. *Chamberlayn*, W. N. (1887), 158.

(*t*) See *Keyse* v. *Heydon*, 20 L. T. O. S. 244; *Morris* v. *Kearsley*, 2 Y. & C. 139.

(*u*) *Bird* v. *Fox*, 11 Ha. 48.

(*x*) *Hume* v. *Pocock*, 1 Ch. 379; but see the special circumstances.

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How to be framed when early title lost or defective.

If, therefore, the earlier title be merely wanting, the condition should provide for the abstract commencing with a specified document, the nature and effect of which should be stated, if it be of such a kind as not to form a satisfactory root of title (*y*).

Production of abstract before sale sometimes advisable.

In some cases it may be prudent, in using very special conditions, to state, that an abstract may be inspected before the sale (*z*).

As to opinion of counsel being binding.

Where conditions provide that the opinion of Mr. A. B., an eminent counsel, in favour of a point in the title, shall be conclusive on the purchaser, the vendor is not, it is conceived, at liberty to suppress the fact that Mr. C. D., a counsel of, it may be, much less eminence, has given a different opinion.

Identity of parcels.

It is often requisite to insert conditions providing for defects in evidence of the identity of the parcels; such conditions, however, will not relieve the vendor from the necessity of pointing out what the entire property is which he intends to convey; nor (unless expressly framed to meet the case) will they do more than provide for mere *deficiencies* in evidence; that is, they will not provide for *repugnances*, nor for an entire *absence* of evidence (*a*).

When part of property cannot be found;

For instance, a condition that a certain plot of land could not be properly identified by the vendor, but it being fairly presumed that the purchaser, by inquiry in the neighbourhood, would be able to ascertain its true situation, he was to accept the plot by the description only contained in the conveyance deed of it, was held inoperative, even at Law, when it appeared that the plot did not exist or could not be discovered (*b*).

(*y*) *Re Marsh and Earl Granville*, 24 Ch. D. 11.

(*z*) *Flood* v. *Pritchard*, 40 L. T. 873; *Hyde* v. *Warden*, 3 Ex. D. 72.

(*a*) *Curling* v. *Austin*, 2 Dr. & S. 129, *q. v.*

(*b*) *Robinson* v. *Musgrove*, 2 M. & R. 92.

or cannot be identified;

So, a condition that "the purchaser is not to require any further proof of the identity of the property than is furnished by the title deeds themselves," is insufficient in the absence of proof of identity as to the whole or part of the property (*c*). It is, in effect, a contract that the deeds shall show identity; and if they do not, a good title is not made (*d*).

or descriptions are inconsistent

So, a condition that no further evidence of identity of the parcels should be required than what was afforded by the deeds, instruments, and other documents abstracted, did not preclude a requisition for further evidence when the descriptions of the parcels in the abstracted documents varied from those in the particulars and from each other (*e*).

On sale of lands of different tenures.

Upon a sale of intermixed lands of different tenures, under the common condition as to identity, the purchaser seems to be still entitled (*f*) to have the land of each particular tenure pointed out and distinguished by its boundaries (*g*).

Vague descriptions copyholds sufficient.

In the case of copyholds, the generalty and vagueness of the descriptions on the Court Rolls are unimportant, if the vendor can show that the property has been actually held under such descriptions (*h*).

Stringent conditions favoured Court.

The Courts, it may be remarked, look with jealousy on conditions negativing a purchaser's right to a substantially good title, or to the usual and reasonable evidences of title: it has in fact been observed by an eminent Judge (*i*), that in some cases it would be almost a fraud for a vendor to bring a title to market with a condition that the purchaser should accept it. At any rate, such conditions should not be used

(*c*) *Curling* v. *Austin*, 2 Dr. & S. 129.

(*d*) *Ibid.*

(*e*) *Flower* v. *Hartopp*, 6 B. 476.

(*f*) *Monro* v. *Taylor*, 8 Ha. 51.

(*g*) See *Dawson* v. *Brinckman*, 3 M. & G. 53; *Crosse* v. *Lawrence*, 9 Ha. 462; and *ante*, pp. 167, 168.

(*h*) *Long* v. *Collier*, 4 Russ. 267.

(*i*) Parker, V.-C., in *Hume* v. *Bentley*, 5 De G. & S. 527. See, too, *Jackson* v. *Whitehead*, 28 B. 154; *Smith* v. *Harrison*, 5 W. R. 408; *Warde* v. *Dickson*, 7 W. R. 148; *Edwards* v. *Wickwar*, 1 Eq. 68; *Hoy* v. *Smythies*, 22 B. 510; *Re Banister*, 12 Ch. D. 131.

to a greater extent than is necessary, as their tendency is to damp the sale; and this not so much by diminishing the biddings of parties who actually attend, as by keeping away others who are alive to their objectionable character. The prejudicial effect of even the most stringent conditions is, however, practically far less than might be reasonably anticipated.

Abstract on sale in lots, should be verified at vendor's expense.

And it may be observed, that, on a sale in lots, the vendor should either verify the abstract at his own expense, or the expense of verification should be divided among the purchasers in some specified proportion; otherwise the purchaser who first calls for evidence may be at the sole cost of procuring it.

Expense of concurrence of necessary parties;

A condition that the purchaser shall have a proper conveyance at his own expense, does not throw upon him the expense of procuring the concurrence of necessary parties (*k*).

of getting in outstanding term.

It is also usual to provide that the purchaser shall be at the expense of getting in and procuring the surrender or release of any outstanding legal estate or term; but such a condition does not extend to a mortgage term which is on foot at the time of sale, even though provision may have been made for satisfying the mortgage (*l*). It is conceived that the necessity for this condition is not affected by sect. 5 of the Conveyancing Act, 1881, enabling the Court, upon a sale, to declare the land sold free from incumbrances. The section is probably intended to apply only in exceptional cases, as where the incumbrancer cannot concur in the ordinary way.

Condition that the property shall be taken subject to all easements, &c.

A condition is usually inserted that the property shall be taken subject to all rents, rights of way and water, and other easements (if any) charged or subsisting thereon; the effect of such a condition is not, it is conceived, to relieve the

(*k*) *Paramore* v. *Greenslade*, 1 S. & G. 541.

(*l*) *Stronge* v. *Hawkes*, 2 Jur. N. S. 388; *vide ante*, p. 163.

vendor from the necessity of disclosing these liabilities, if he is aware of them (*m*), but simply to protect him, if it should afterwards transpire that the property is subject to some rent, right, or easement, in favour of a third person, of which he was ignorant at the time of sale; and where one tenant has acquired a right of way against another tenant, under the same landlord, and both tenements are simultaneously sold by the landlord under a condition that they are to be taken subject to, and with the benefit of, all subsisting rights of way, the purchaser of the one tenement gains no right of way against the purchaser of the other (*n*); the meaning of the condition being that if there are any rights of way as against the *vendor*, the purchaser shall take subject to them.

Indemnity against charges, &c.

If the estate be subject to incumbrances which cannot or are not intended to be discharged, they must be mentioned in the particulars or conditions (*o*). It often happens that property is subject to charges which, from particular circumstances (such as there being other ample security), are never likely to be enforced, although they cannot be immediately released (*p*); in such cases it is advisable to state the facts as clearly and openly as possible, and to stipulate that the purchaser shall make no objection in respect of the matters so mentioned: if, as may often be the case, an indemnity be offered, its nature should be explicitly stated (*q*). A condition that a purchaser should presume the extinction of a charge upon the ground of its non-recognition for a specified period is not binding, if the charge, although not so described, is in

(*m*) *Heywood* v. *Mallahieu*, 25 Ch. D. 357; *Nottingham Brick Co.* v. *Butler*, 16 Q. B. D. 778.

(*n*) *Daniel* v. *Anderson*, 8 Jur. N. S. 328; and see *Suffield* v. *Brown*, 33 L. J. Ch. 249; *Russell* v. *Harford*, 2 Eq. 507. But see and distinguish *Fahey* v. *Dwyer*, 4 L. R. Ir. 271.

(*o*) See *Torrance* v. *Bolton*, 8 Ch. 118, where the incumbrances were mentioned in the conditions, but not in the particulars, and this was held to be insufficient.

(*p*) This difficulty can, where the Court thinks fit, be got over by an application under s. 5 of the Conv. Act, 1881; see *Re G. N. R. Co. and Sanderson*, 25 Ch. D. 788.

(*q*) See 1 Dav. 703. As to how a general agreement to give an indemnity will be carried out, see *Cottrell* v. *Watkins*, 1 B. 361; *Casamajor* v. *Strode*, 1 Wils. Ch. 428.

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fact reversionary (*r*). A condition to give a specified indemnity will be specifically enforced in Equity (*s*).

Time for objections, and for rescinding contract.

It has become very usual to insert conditions (*t*) restrictive of the time within which objections or requisitions may be taken, or made by the purchaser; and enabling the vendor to annul the sale, if objections are taken, or requisitions made, which he is unable or unwilling to remove or comply with; the latter condition is inserted by many practitioners, as a matter of course, in all but the very plainest cases; and is now commonly introduced even on sales by the Court; and is not such a depreciatory condition as may not be used by a fiduciary vendor (*u*). The condition is usually framed so as to entitle the vendor to rescind, not merely on the purchaser insisting upon some objection as to *title*, but on his insisting on any objection or requisition as to either title or conveyance; and should provide that the right may be exercised notwithstanding any intermediate or pending negotiation in respect of such objection or requisition, or any attempt to remove or comply with the same. The extension, however, of the condition to objections to conveyance has been adversely criticised by Pearson, J., who stated that it should only be employed where trustees are selling and wish to preclude the strict right of the purchaser to the concurrence of beneficiaries in the conveyance (*x*).

When vendor justified in rescinding.

A vendor is entitled under such a condition to rescind the contract, notwithstanding that it provides for compensation in case of any error or mistake in the description of the property or of the vendor's interest therein (*y*); and he may do so even

(*r*) *Drysdale* v. *Mace*, 5 D. M. & G. 103.

(*s*) *Walker* v. *Barnes*, 3 Mad. 247.

(*t*) Their validity recognized, *Blackburn* v. *Smith*, 2 Ex. 783; *Powell* v. *Smithson*, 20 L. T. O. S. 105.

(*u*) *Falkner* v. *Equitable Revy. Society*, 4 Dr. 352. But see and distinguish, *Moeser* v. *Wisker*, L. R. 6 C. P. 120.

(*x*) *Hardman* v. *Child*, 28 Ch. D. 712.

(*y*) *Mawson* v. *Fletcher*, 6 Ch. 91; where, according to the particulars, the estate contained freestone and limestone, which, however, belonged to the lord, and not to the vendor; and see *Heppenstall* v. *Hose*, 33 W. R. 30; *Re Dames and Wood*, 29 Ch. D. 626; *Re Terry and White*, 32 Ch. D. 14.

after a bill has been filed by the purchaser for specific performance, and a subsequent waiver of the objection will not revive the contract (z); and where the vendor himself brings an action for specific performance he may, it seems, at any time before the cause comes on for hearing, rescind under such a condition, but only upon the terms of getting his bill dismissed with costs (a). But where the vendor's right to rescind arises on the purchaser's insisting on an objection, which the vendor is unable or unwilling to remove, the latter is not justified in rescinding, if the former, on being made acquainted with the fact, at once waives his objection (b); and the vendor must first answer the requisitions, even though some of them may be untenable, and thus give the purchaser an opportunity of waiving them (c). The condition will not enable the vendor to rescind where he is unable to make any title at all (d); or where the requisition is that an incumbrance be discharged (e); or where the condition relates to title only, and the requisition is as to conveyance, *e. g.*, that an outstanding legal estate be got in (f); and the vendor must exercise his option to rescind within a reasonable time (g); and the institution by him of an action for specific performance will be taken to be evidence of his intention not to rescind (h). If the condition be for rescinding the contract, in case the title shall not prove "satisfactory" to the purchaser, this will not authorize him to make any other than the usual objections (i).

"Satisfactory" means "marketable" title.

The condition, in order to preclude questions on the point, should limit a time within which further requisitions or

Time should be limited within which

(z) *Hoy* v. *Smythies*, 22 B. 510.

(a) *Warde* v. *Dickson*, 5 Jur. N. S. 698; and see *Gray* v. *Fowler*, L. R. 8 Ex. 249.

(b) *Duddell* v. *Simpson*, 2 Ch. 102.

(c) *Greaves* v. *Wilson*, 25 B. 290; *Turpin* v. *Chambers*, 29 B. 104; *Duddell* v. *Simpson*, 2 Ch. 102, 107.

(d) *Bowman* v. *Hyland*, 8 Ch. D. 588.

(e) *Re Jackson and Oakshott*, 14 Ch. D. 851.

(f) *Kitchen* v. *Palmer*, 46 L. J. Ch. 611.

(g) *St. Leonard's, Shoreditch* v. *Hughes*, 17 C. B. N. S. 137; *Ker* v. *Crowe*, 7 I. R. C. L. 181.

(h) *Gray* v. *Fowler*, *suprà*; but his right to rescind will revive on the purchaser raising a new, or an abandoned, objection; *S. C.*

(i) *Lord* v. *Stephens*, 1 Y. & C. 222.

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further objections are to be taken.

objections, in answer to replies or further documents furnished by the vendor, must be sent in by the purchaser.

But the condition does not apply where the objections are not apparent on the abstract.

But a condition restrictive as to the time within which the purchaser's requisitions are to be made cannot be relied on, where there are grave objections to the title, which are not discoverable on the face of the abstract. In one case (*k*), V.-C. Kindersley, on dismissing the plaintiff's bill for specific performance, said that under the ordinary condition limiting the time for making requisitions, if facts were subsequently discovered showing that the vendor had no title, or a bad title, or one open to the greatest possible doubt, he for one would never hold that the purchaser was precluded from raising objections, if the facts on which they were founded were not known to him when he delivered his requisitions.

Or where vendor knowingly sells defective title.

Nor can the condition be relied upon by a vendor who knowingly enters into the contract with a clearly defective title to a portion of the estate: for instance, where a person entitled in remainder subject to a life estate, contracted to sell the fee simple in possession, hoping that the tenant for life would concur, which she refused to do, the purchaser was allowed to take the reversion with a compensation, although there was a condition for rescinding the contract if a good title could not be made, which condition the vendor wished to enforce (*l*): nor does the condition apply where the vendor has been guilty of wilful misrepresentation (*m*): whether or no it applies to a case which falls within a condition as to compensation seems to be doubtful (*n*); and a vendor cannot make use of such a condition for the purpose

(*k*) *Wade* v. *Dickson*, 5 Jur. N. S. 698; see, too, *Boyd* v. *Dickson*, 10 I. R. Eq. 255.

(*l*) *Nelthorpe* v. *Holgate*, 1 Coll. 203; but see *Thomas* v. *Dering*, 1 Ke. 729; and see also *Mawson* v. *Fletcher*, 6 Ch. 91, where the vendor, notwithstanding the clause as to compensation, was held entitled to rescind; cf. *Gray* v. *Fowler*, L. R. 8 Ex. 281 *et seq.*, per Blackburn, J.; and *Re Terry and White*, 32 Ch. D. 14.

(*m*) See *Price* v. *Macaulay*, 2 D. M. & G. 347.

(*n*) *Hoy* v. *Smythies*, 22 B. 510, cf. *Mawson* v. *Fletcher*, 6 Ch. 91.

of getting rid of the duty which attaches to him upon the rest of his contract: thus if he has undertaken to give possession, he cannot avail himself of the condition to escape compliance with the purchaser's requisition that a party wrongfully in possession shall be ousted before completion (*o*).

Or where purchaser is willing to complete.

Nor does the condition enable a vendor to refuse to show a title, or to procure the concurrence of a mortgagee, if he sells free from incumbrances (*p*), even though he may have been unaware of the existence of the mortgage when he entered into the contract (*q*); or to rescind the contract, as against a purchaser who is willing to waive the objection or requisition, and take the property without compensation (*r*): but it enables a vendor, who has in fact a good title, and who has duly performed his duties under the contract, to rescind upon a requisition being insisted on, which is either frivolous or untenable, or which, on the ground of expense, or for other sufficient cause, he cannot reasonably be expected to comply with (*s*). Thus, where time was made of the essence of the contract, and on the day named for completion, the vendor executed the conveyance, and demanded payment of the purchase-money, which the purchaser refused on the ground that two requisitions as to the registration of a deed and the sufficiency of a stamp, (both of which the vendor was able and had undertaken to comply with,) were still unsatisfied, the vendor, having given notice of his intention, was held justified in rescinding the contract (*t*).

Where the condition does apply.

(*o*) *Engel* v. *Fitch*, L. R. 3 Q. B. 314; and see *Greaves* v. *Wilson*, 25 B. 290; and *Powell* v. *Powell*, 19 Eq. 422, where the sale, though under the direction of the Court, was invalid by reason of its having been made before the filing and approval of the certificate in answer to the preliminary inquiries.

(*p*) *Greaves* v. *Wilson*, *supra*.

(*q*) *Re Jackson and Oakshott*, 14 Ch. D. 851. See p. 177, *ante*, as to the effect of s. 5 of the Conveyancing Act, 1881, on the point raised here, and the principle of its application laid down in *Re G. N. R. Co. and Sanderson*, 25 Ch. D. 788.

(*r*) See and consider *Roberts* v. *Wyatt*, 2 Taun. 268; *Page* v. *Adam*, 4 B. 269; *Williams* v. *Edwards*, 2 Si. 78.

(*s*) *Greaves* v. *Wilson*, *supra*, and see *Page* v. *Adam*, *supra*.

(*t*) *Hudson* v. *Temple*, 29 B. 536.

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The condition is usually framed so as to cover objections and *requisitions*, "whether in respect of title, conveyance, or otherwise" (*u*). Where, however, a purchaser required that certain annuitants, whose concurrence was held unnecessary, should join in the conveyance, it was considered that this was an objection to the *title* within the meaning of the condition (*x*). But the condition should in terms extend to requisitions. Where ordinary leaseholds were erroneously stated to be renewable by custom, this was held to be a misdescription of the subject matter of sale, coming within the compensation clause; and not a defect in title within the meaning of the condition for rescinding (*y*): so, where the amount of the fines was mis-stated on the sale of a manor (*z*).

Conditions precedent to right of rescission.

It was formerly laid down (*a*), that three conditions must have been fulfilled, before the right to rescind could be exercised: viz. (1) an inability or reasonable unwillingness to remove the purchaser's objection, or comply with his requisition: (2) a communication of that inability or unwillingness to the purchaser: (3) an insistance by the purchaser on his objection or requisition, which seems to imply the granting of a *locus penitentiæ*, or reasonable time within which the purchaser may withdraw his objection or requisition. But it has recently been held by the Court of Appeal that no *locus penitentiæ* need be given to the purchaser; and that all that is required of the vendor is that, if he exercises his right, it shall be done reasonably and not capriciously, and that he is not bound to give his reasons (*b*).

Form of condition defining insistance.

A question, however, may still arise, as to what constitutes such an insistance by the purchaser as will entitle the

(*u*) *Greaves* v. *Wilson*, 25 B. 290; see as to the propriety of adding "conveyance," *ante*, p. 178.

(*x*) *Page* v. *Adam*, 4 B. 269. And see *Kitchen* v. *Palmer*, 46 L. J. Ch. 611, where the condition was held to relate to title only, and not to relieve the vendor from the obligation of getting in an outstanding legal estate.

(*y*) *Painter* v. *Newby*, 11 Ha. 26.

(*z*) *Hoy* v. *Smythies*, 22 B. 510.

(*a*) *Duddell* v. *Simpson*, 2 Ch. 102, 107; *Mawson* v. *Fletcher*, 6 Ch. 91.

(*b*) *Glenton to Haden*, 53 L. T. 434, 436.

vendor to exercise the right to rescind. This is a question on which the tendency of modern decisions seems to have been in favour of the vendor (*c*). It is certainly fair to the purchaser, and also desirable in the interest of both vendor and purchaser, that any such question should be avoided; and it is therefore prudent in framing the condition to fix a definite time within which the purchaser may withdraw any objection or requisition which the vendor states himself to be unable or unwilling to remove or comply with (*d*).

Right to rescind lost by replying to objections.

It has been held that a vendor by replying to the purchaser's objections or requisitions, waives the right to rescind the contract, and also the benefit of the condition limiting the purchaser's time for taking objections, &c. (that is, supposing them not to have been taken within such limited time) (*e*); but according to modern decisions a vendor cannot properly exercise his right to rescind, until he has first answered the requisitions (*f*). And the right to rescind may, of course, be lost by acquiescence in, or confirmation of the contract (*g*); or by a parol variation of the condition, the non-compliance with which gave the right to rescind (*h*); or by the institution of an action for specific performance (*i*), unless the objection is raised for the first time by the defence (*j*).

Exceptions from rule.

It seems, however, probable that mere argumentative replies would not amount to such a waiver: and that replies of any description, if returned "without prejudice," or with any similar reservation of the vendor's rights, would escape the rule above referred to (*k*): or it may, it is conceived,

(*c*) *Re Dames and Wood*, 29 Ch. D. 626; *Glenton to Haden*, 53 L. T. 434.

(*d*) *Re Jackson and Oakshott*, 14 Ch. D. 851.

(*e*) *Tanner* v. *Smith*, 10 Si. 410; see the same case on appeal, 4 Jur. 310; *Cutts* v. *Thodey*, 13 Si. 206; *Lane* v. *Debenham*, 11 Ha. 188; *M'Culloch* v. *Gregory*, 1 K. & J. 294.

(*f*) *Vide ante*, p. 179.

(*g*) *Ante*, p. 117.

(*h*) *Dawson* v. *Yates*, 1 B. 301.

(*i*) *Warde* v. *Dickson*, 9 Jur. N. S. 698.

(*j*) *Gray* v. *Fowler*, L. R. 8 Ex. 249.

(*k*) See *Morley* v. *Cook*, 2 Ha. 106.

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be avoided, by the introduction, into the condition, of the words "notwithstanding any intermediate negotiations," or some equivalent expression.

Time runs from delivery of "perfect abstract."

For the purposes of such conditions, time runs from the delivery of a perfect abstract (*k*); that is, an abstract as perfect as the vendor, at the time of delivery, has in his either actual or constructive possession (*l*); or (as a learned judge has expressed it) an abstract "which contains with sufficient clearness and sufficient fulness the effect of every instrument which constitutes part of the vendor's title" (*m*): but a vendor would not be at liberty designedly to deliver an imperfect abstract, or otherwise to neglect his duties under the contract, for the purpose of rescinding the contract under such conditions (*n*).

Objections on subsequent evidence.

And the condition as to time does not preclude a purchaser from taking subsequent objections arising out of evidence called for before the expiration of the limited time (*o*): such objections must, however, it is submitted, be taken within a corresponding period after the production of such evidence (*p*).

As to resale, and forfeiture of deposit; how far binding.

It is usual, and proper, to insert a condition providing for a resale of the property, and forfeiture of the deposit, in case the purchaser fail to comply with the conditions (*q*); and that any deficiency upon such resale, together with the costs thereof (*r*), shall be borne by the purchaser. But even

(*k*) *Hobson* v. *Bell*, 2 B. 17.

(*l*) *Morley* v. *Cook*, 2 Ha. 111; *Steer* v. *Crowley*, 14 C. B. N. S. 337.

(*m*) V.-C. Kindersley, in *Oakden* v. *Pike*, 11 Jur. N. S. 666; and see *Parr* v. *Lovegrove*, 4 Dr. 170.

(*n*) *Page* v. *Adam*, 4 B. 269; *Morley* v. *Cook*, *ubi suprà*; *Roberts* v. *Wyatt*, 2 Taun. 268. In such a case it seems that an action of deceit would lie; *per* Blackburn, J., *Gray* v. *Fowler*, L. R. 8 Ex. 249, 282.

(*o*) *Blacklow* v. *Laws*, 2 Ha. 40; *Morley* v. *Cook*, *ibid.* 112.

(*p*) See and consider *Sherwin* v. *Shakspear*, 5 D. M. & G. 536; and *vide ante*, p. 180.

(*q*) See *Gee* v. *Pearse*, 2 De G. & S. 341.

(*r*) It was held under the old Bankruptcy Law that these costs could not be proved in Bankruptcy, although the vendor might apply the proceeds of a resale in their discharge,

without such condition, the vendor will be entitled to retain the deposit if the purchaser makes default: the deposit being not merely a part payment, but also an earnest of the performance of the contract (*s*); or he may resell and bring an action for damages, *i.e.*, the amount of the loss on the resale, against the purchaser (*t*).

If, upon a resale, the estate were to produce more than the original purchase-money, the purchaser who had violated his agreement could not call for an account of the surplus (*u*). A stipulation that the purchaser making default should pay a specified sum (exceeding the amount of the deposit,) as liquidated damages, was held at Law not to amount to a condition for the forfeiture of the deposit (*x*): nor is the usual condition for forfeiture of the deposit any bar to an action for general damages, if the purchasers refuse to complete (*y*); but after a resale at a loss the vendor cannot sue for the original purchase-money (*z*). Where the deposit has been forfeited, and the vendor claims for the deficiency on the resale, the deposit will be taken into account in assessing the damages (*a*). But where the vendor does not succeed in effecting a resale, he is entitled to retain the deposit paid by the defaulting purchaser, and to the costs of the abortive sale (*b*). The omission by fiduciary vendors to enforce the common clause, is not necessarily a breach of trust (*c*).

Condition for payment of penalty distinguished.

and then towards the payment of the original purchase-money, and prove for the deficiency: *Ex p. Hunter*, 6 V. 98; and see *Ex p. Lord Seaforth*, 19 V. 235; and *Ex p. Gyde*, 1 Gl. & J. 323; but see now 32 & 33 V. c. 71, s. 31; 46 & 47 V. c. 52, s. 37, which allow proof of unliquidated debts arising out of breach of contract; see Yate-Lee, 169 *et seq.*

(*s*) *Ex p. Barrell*, 10 Ch. 512; *Best* v. *Hamand*, 12 Ch. D. 1; *Collins* v. *Stimson*, 11 Q. B. D. 142; *Howe* v. *Smith*, 27 Ch. D. 89, 101 *et seq.*; and see *Soper* v. *Arnold*, 35 Ch. D. 384.

(*t*) *Noble* v. *Edwardes*, 5 Ch. D. 378.

(*u*) *Ex p. Hunter*, 6 V. 97.

(*x*) *Palmer* v. *Temple*, 9 A. & E. 508; but see the remarks on this case in *Howe* v. *Smith*, 27 Ch. D. 89, 100.

(*y*) *Icely* v. *Grew*, 6 N. & M. 467.

(*z*) *Lamond* v. *Davall*, 9 Q. B. 1030.

(*a*) *Ockenden* v. *Henley*, 1 E. B. & E. 485.

(*b*) *Essex* v. *Daniell*, L. R. 10 C. P. 538.

(*c*) *Thomson* v. *Christie*, 1 Macq. 236.

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Facts stated must be proved.

Whether purchaser precluded from evidence may require information.

In the preparation of special conditions it is important to remember, that a purchaser, unless specially precluded from so doing, may require evidence of all matters of fact stated in any condition which goes to restrict his *primâ facie* rights (*d*). It has, in fact, been suggested (*e*), that the ordinary condition throwing upon the purchaser the expense of procuring evidence to verify the abstract, does not preclude him from requiring all such information as to facts as is necessary to complete the abstract: so that, although precluded from requiring, except at his own expense, any evidence of a death (material to the title), he may yet insist on being informed when and where such death occurred: in many cases the expense of obtaining such information would be nearly the same as that of obtaining the usual evidence of the fact; and the point, although (it is conceived) not often insisted or capable of being insisted on in practice, may sometimes be usefully guarded against by the conditions.

Section 4.

As to what special conditions are generally requisite in various specified cases.

What conditions expedient on sale of inclosed lands.

(4.) *As to what special conditions are generally requisite in various specified cases* (*f*).

Upon a sale of lands held under an Inclosure Act, it will often be expedient to negative the purchaser's *primâ facie* right to evidence of the validity and regularity of the award; and attention must be paid to the rule which, when an allotment has been made indiscriminately in respect of lands held under different titles, requires the production and proof of all such titles; a rule which, if not guarded against, may occasionally lead to expenses which will swallow up the purchase-money (*g*). This precaution, however, as to the validity and regularity of the award, is not necessary where the case falls within the 3 & 4 Vict. c. 31, which

(*d*) *Symons* v. *James*, 1 Y. & C. C. C. 487. See *Johnson* v. *Smiley*, 17 B. 233.

(*e*) 9 Jarm. Conv. 52 n.

(*f*) See cases under this head more fully discussed in Ch. VIII. under the subject of the "Abstract to be deduced in special cases"; and see 1 Dav. 671 *et seq.*; 1 K. & E. 244 *et seq.*

(*g*) 1 Dav. 527.

As to validity of award.

provides that all awards made in pursuance of that Act, or under the General Inclosure Act (6 & 7 Will. IV. c. 115), shall be conclusive evidence that all the provisions of those Acts have been complied with, and that no other evidence than the awards shall be requisite to establish the title. The want of enrolment of the award is remedied by the 3 & 4 Will. IV. c. 87, in cases where the award was executed before the passing of the Act; and by the 17 & 18 Vict. c. 97 (*h*), the commissioners are enabled to extend the time for enrolment. Where the estate, in respect of which the allotment is made, is conveyed to the purchaser prior to the actual award, the right to the allotment goes with it (*i*); and an allottee may, before the actual award, sell and convey the legal estate in his allotment, apart from the right or interest in respect of which it is allotted (*k*).

As to enrolment.

As to reservations under award.

It will also generally be proper to insert a condition in respect to any reservations or liabilities under the Act or award. Such a reservation, *e. g.*, of mines and the right to work them, or manorial rights generally, will, if expressed in general terms, affect lands sold by the commissioners for the payment of expenses, as well as ordinary allotments (*l*).

Land formerly waste.

Where the property comprises strips of waste land recently inclosed, some special stipulations as to title will almost invariably be necessary (*m*).

In some districts it seems to have been a common practice for parties to inclose such strips with the permission of the lord of the manor, upon payment to him of a small annual sum, but without any assurance or written agreement; and

(*h*) See sect. 7.

(*i*) *Doe* v. *Willis*, 5 Bing 441; Sug. 374; and see now 8 & 9 V. c. 118, s. 84; *Williams* v. *Phillips*, 8 Q. B. D. 437, 441.

(*k*) See *Kingsley* v. *Young*, 18 V. 207; *Doe* v. *Saunder*, 5 A. & E. 664, and cases cited; and see 8 & 9 V. c. 118, s. 84.

(*l*) *Duke of Buccleuch* v. *Wakefield*, L. R. 4 H. L. 377; *Love* v. *Bell*, 10 Q. B. D. 568, 9 Ap. Ca. 286.

(*m*) See, as to the presumption of ownership of such strips, *Steel* v. *Prickett*, 2 Stark. 463, *Doe* v. *Pearsey*, 7 B & C. 304; *Grose* v. *West*, 7 Taun. 39; and *Scoones* v. *Morrell*, 1 B. 251; *et vide post*, p. 379.

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then to deal with them as freehold, subject to a chief rent. In such a case the tenure seems to be merely that of a yearly tenancy.

Encroachments.

As between landlord and tenant, the former is presumably entitled to encroachments made by the latter during his tenancy (*n*); but this general presumption may be negatived by evidence proving the tenant's title (*o*); and it is not necessary that the encroachment should be contiguous to the land held by the tenant; but only that it should be in such proximity as to lead to the presumption that his position as tenant enabled him to approve (*p*). The title of the landlord will not be affected by the circumstance of his mere assent to the encroachments (*q*); but if the landlord subsequently to the encroachment re-demises the original tenement by a description which excludes encroachment, it has been said that the presumption of accretion is excluded (*r*). In the absence of an express stipulation to the contrary, there is in Equity an implied agreement that the tenant is to hold any encroachment upon the same terms as his original lease (*s*). Where part of the property consists of an encroachment, and either the ordinary presumption, or the evidence rebutting it, is doubtful, a special stipulation as to title will be necessary. It is doubtful whether the doctrine of encroachments applies in the case of copyholds (*t*).

Grants from the Crown.

Upon a sale of tithes held as lay property, or of other property held under a grant from the Crown, the vendor

(*n*) See *Doe* v. *Jones*, 15 M. & W. 580, and cases cited; and see also, as to encroachments, &c., by trustees, *A.-G.* v. *Corp. of Cashel*, 3 D. & War. 294, 309.

(*o*) See *Doe* v. *Massey*, 17 Q. B. 373; *Andrews* v. *Hailes*, 2 E. & B. 349; *Doe* v. *Tidbury*, 14 C. B. 304; *Kingsmill* v. *Millard*, 11 Ex. 313.

(*p*) *Earl of Lisburne* v. *Davies*, L. R. 1 C. P. 259.

(*q*) *Whitmore* v. *Humphries*, L. R. 7 C. P. 1.

(*r*) *A.-G.* v. *Tomline*, 15 Ch. D. 160.

(*s*) *White* v. *Wakley*, 4 Jur. N. S. 988; see, and distinguish, *Drummond* v. *Sant*, L. R. 6 Q. B. 763. As to validity of settlements by parties holding by encroachment or otherwise by a voidable title, see *Yem* v. *Edwards*, 1 D. & J. 599.

(*t*) *A.-G.* v. *Tomline*, 15 Ch. D. 150, 160.

should protect himself from being required to produce the original grant, if it is lost or not in his possession.

Enfranchised copyholds.

Where the property has been recently enfranchised (*u*), it is no longer necessary to insert a condition negativing the right to production of the manorial title (*x*); but, if produced, it may sometimes be well to guard against any question as to the right of the purchaser to require evidence of the manor having, since the enfranchisement, been enjoyed conformably with the earlier title (*y*). Where, however, the enfranchisement has been effected under the General Enfranchisement Act, it neither was nor is necessary to show the lord's title (*z*).

Whether a person assuming to act as lord can enfranchise.

By the 4 & 5 Vict. c. 35, enabling enfranchisement by voluntary arrangement, the word "lord" is to include a person filling that character, or acting in that capacity, *whether rightfully entitled or not* (*a*); and by the 15 & 16 Vict. c. 51, it is to include a person seised for life, or in tail, or in fee simple, and the words italicized are omitted (*b*). Notwithstanding the omission, it would seem that a compulsory enfranchisement under the latter Act may be effectual, even in cases where the person assuming to act as lord has no title (*c*). The enfranchisement is not complete until confirmed by the commissioners (*d*); and, therefore, if a copyhold tenant dies before the award is confirmed, the lord is entitled to a new tenant and a fine on his admittance; but the proceedings are not abated (*e*).

Copyholds formerly waste.

Where, in the case of copyholds, the title depends upon grants, made by the lord of the manor, of part of the waste,

(*u*) *Vide post*, p. 330.

(*x*) Conv. Act, 1881, s. 3 (2).

(*y*) See 1 Jarm. Conv. 83.

(*z*) *Kerr* v. *Pawson*, 25 B. 394; and see 4 & 5 V. c. 35, s. 64; 6 & 7 V. c. 23; 7 & 8 V. c. 55; 15 & 16 V. c. 51; 16 & 17 V. c. 57; 21 & 22 V. c. 94.

(*a*) Sect. 102.

(*b*) Sect. 52.

(*c*) See and consider *Kerr* v. *Pawson*, *suprà*, and 21 & 22 V. c. 94, s. 2, repealing sect. 11 of 15 & 16 V. c. 51.

(*d*) 21 & 22 V. c. 94, s. 10.

(*e*) *Myers* v. *Hodgson*, 1 C. P. D. 609.

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it will, in general, be expedient to provide that no evidence shall be required of such grants being authorized by the custom of the manor: even although in some manors the right is well established.

Unstamped and unregistered documents.

The vendor is *primâ facie* responsible for his title deeds being properly stamped; so that, if there is any doubt of their being so, he should protect himself (*f*). So, too, where land is in a register county, he should, in case of doubt, guard against the deeds being unregistered. It has, however, recently been held by Chitty, J. (*g*), that, where the condition was in the ordinary form, viz., that no objection should be taken on account of any document not being registered, the purchaser was not entitled to rescind the contract, although the vendors were aware that the will under which they claimed had not been registered, and although this defect was, in the particular circumstances of the case, irremediable. These conditions, must, however, be to some extent depreciatory, and should not therefore be used except where there is some reason to believe that they will be required.

Leaseholds.

Upon a sale of leaseholds, the following points will require attention:—

Against production of lessor's title.

A condition that the lessor's title, whether express, or implied by statute, shall not be objected to will not, it is conceived, absolutely bind the purchaser if there is a material flaw in the title, endangering his safety, which is not disclosed by the vendor (*h*), as, for example, that the statutory powers of leasing of a mortgagor or mortgagee of land have been excluded.

Rule against production in V. & P. Act, 1874.

The necessity for such a condition is superseded by the Vendor and Purchaser Act, 1870, and the Conveyancing Act,

(*f*) *Smith* v. *Wyley*, 16 Jur. 1136; *Whiting to Loomes*, 18 Ch. D. 10; but see and distinguish, *Re Birkbeck Society*, 24 Ch. D. 119.

(*g*) *Girling* v. *Girling*, W. N. (1886), 18.

(*h*) *Lecoy* v. *Mogford*, 2 Jur. N. S. 1085.

1881, the joint effect of which is to provide, as one of the rules which, subject to express stipulation, are to regulate the obligations and rights of vendor and purchaser, that under a contract for the sale of a term, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign is not to be entitled to call for the title to the reversion, whether freehold or leasehold (*i*). It is conceived that the purchaser is not precluded by this rule from making any objection or requisition, not involving an actual production, in respect of the freeholder's title, or from requiring proof of his right to grant the lease; and he will have constructive notice of the lessor's title, just as he would formerly have had where he stipulated not to inquire into it (*k*). "To call for the title" would seem naturally to mean "to call for its production," or, "to require it to be deduced;" but even if the rule could be construed as precluding the right to make any requisition in respect of the title, it is still less comprehensive than the condition in ordinary use; which, when it is in the form that the lessor's title shall not be inquired into, may, as we have seen (*l*), preclude an objection taken *aliunde*.

Covenants in lease, how to be noticed.

The covenants in the lease should never be referred to as "usual:" except, perhaps, in the case of property forming part of a large estate, where the form of the lease is a matter of notoriety: the preferable plan is, to produce an abstract or copy of the lease at the time of sale; and to state the intention so to do in the particulars or conditions, and to stipulate that the purchaser shall be deemed to have full notice of its contents: but a reasonable opportunity of examining it should be allowed him (*m*).

What are "usual covenants."

Covenants to pay land-tax, sewers rate, and all other taxes,

(*i*) 37 & 38 V. c. 78, s. 2; Conv. Act, 1881, s. 3 (1).

(*k*) *Patman* v. *Harland*, 17 Ch. D. 353.

(*l*) *Ante*, p. 169. *Hume* v. *Bentley*, 5 De G. & S. 520.

(*m*) *Brumfit* v. *Morton*, 3 Jur. N. S. 1198; *Flood* v. *Pritchard*, 40 L. T. 873. As to what is implied by a statement that there are no unusually restrictive covenants, see *Andrew* v. *Aitken*, 22 Ch. D. 218; *Hampshire* v. *Wickens*, 7 Ch. D. 555; *Hyde* v. *Warden*, 3 Ex. D. 72.

and a proviso for re-entry, if any but a specified business shall be carried on, have been held to be "usual" (*n*); so, too, a covenant that the lessee shall make good any damage occasioned by fire (*o*); and where a landlord agreed to demise at a yearly rent "free of all outgoings," and to grant a lease on the above and other "usual" terms, it was held that the liability to pay the land-tax and tithe commutation rent-charge fell upon the tenant (*p*); so, too, an exceptional expense, incurred for a permanent improvement under the Metropolis Management Acts, was held to fall within the words of a tenant's covenant to pay all rates and assessments whatsoever in respect of the premises (*q*). It is, however, impossible to lay down any general proposition upon this point, the question in each case turning upon the wording of the particular covenant (*r*). But a covenant restrictive of the right of alienation is not a "usual" covenant (*s*); so, too, a covenant not to mow meadow land more than once a year (*t*); so, too, a condition of re-entry for breach of covenant (*u*); so, a covenant that every assignment or underlease should be

(*n*) *Bennett* v. *Womack*, 7 B. & C. 627; *Bradbury* v. *Wright*, 2 Doug. 624.

(*o*) *Kendall* v. *Hill*, 6 Jur. N. S. 968.

(*p*) *Parish* v. *Sleeman*, 1 D. F. & J. 326; *Lockwood* v. *Wilson*, 43 L. J. C. P. 179, in effect overruling *Cranston* v. *Clarke*, Sayer, 78. But see *Jeffery* v. *Neale*, L. R. 6 C. P. 240, where, however, the lessor was himself the owner of the tithe rent-charge.

(*q*) *Thompson* v. *Lapworth*, L. R. 3 C. P. 149; *Allum* v. *Dickinson*, 9 Q. B. D. 632; *Wilkinson* v. *Collyer*, 13 Q. B. D. 1. In *Crosse* v. *Raw*, L. R. 9 Ex. 209, and *Aldridge* v. *Ferne*, 17 Q. B. D. 212, the covenant extended to "outgoings," as to which see *Midgley* v. *Coppock*, 4 Ex. D. 309.

(*r*) As to cases of rates and assessments under the Public Health Acts, see *Rawlins* v. *Briggs*, 3 C. P. D. 368; *Hartley* v. *Hudson*, 4 C. P. D. 367; and *Budd* v. *Marshall*, 5 C. P. D. 481.

(*s*) *Buckland* v. *Papillon*, 2 Ch. 67; *Hampshire* v. *Wickens*, 7 Ch. D. 555. As to the covenants which ought to be inserted in a building or repairing lease, see *Easton* v. *Pratt*, 9 Jur. N. S. 1345. For those in a mining lease, see *Hodgkinson* v. *Crowe*, 10 Ch. 622. As to the effect of the qualifying words "but such consent is not to be arbitrarily withheld," see *Treloar* v. *Bigge*, L. R. 9 Ex. 151; and *Scar* v. *House Property Society*, 16 Ch. D. 387.

(*t*) *Hyde* v. *Warden*, 3 Ex. D. 72, 82.

(*u*) *Hodgkinson* v. *Crowe*, *suprà*. This case must be taken to have overruled *Hawes* v. *Burnett*, 27 B. 500; see *Hampshire* v. *Wickens*; *Hyde* v. *Warden*, *suprà*.

left with the landlord's solicitor, and a fee paid for registration (x).

Purchase of leaseholds since Conv. Act, 1881.

By the Conveyancing Act, 1881 (y), a purchaser of leaseholds is to assume, unless the contrary appears, that the lease or underlease, and every superior lease, was duly granted, and, on production of the receipt for the last payment due for rent (z) under the lease or underlease, before the date of actual completion of the purchase, that all the covenants and provisions of the lease or underlease have been duly performed and observed up to the date of actual completion, and further, that all rent due under any superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date. This implied stipulation will, however, be found insufficient in a large number of cases. The words "unless the contrary appears," restrict its operation, and, in the absence of a judicial decision as to what it covers, it is prudent to provide, in addition, for the case of breaches within the knowledge of the vendor, which he has reason to believe to have been, or to be likely to be, waived by the lessor (a).

As to evidence of covenants, &c., having been performed.

Where the condition was that "the possession under the lease should be deemed conclusive evidence of the due performance, or sufficient waiver of any breach, of the covenants in the lease up to the completion of the sale," it was held that the purchaser was fixed with notice of possible breaches of covenant prior to the contract, which must be taken to be waived; but no opinion was expressed as to what would have been the effect of the condition, if it had been proved that the landlord intended to enforce the forfeiture (b): and the condition was held not to cover breaches committed

(x) *Brooks* v. *Drysdale*, 3 C. P. D. 52.

(y) Sect. 3, sub-sects. 4, 5.

(z) "Rent" does not apply to a peppercorn rent; and the production of a receipt for a peppercorn will not relieve the vendor of a building lease from his liability to show that his covenants have been observed; *Re Moody and Yates*, 30 Ch. D. 344.

(a) Where the actual receipt could not be produced, an affidavit by the vendor of the performance of the covenants was held sufficient; *Ringer to Thompson*, 51 L. J. Ch. 42.

(b) *Howell* v. *Kightley*, 21 B. 331.

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As to disclosure of subsisting breaches.

by the vendor himself after the contract, and before the completion of the sale. It is conceived, however, that any subsisting breach, if within the vendor's knowledge, ought to have been expressly mentioned; and that the condition was properly applicable only to breaches, of which he had no notice, or which he had good reason for believing to be waived. Nor will such a condition bind the purchaser if there is a reasonable *bonâ fide* doubt as to who is the reversioner entitled to receive the rent (*b*). Where it was stipulated that the production of the last receipt for rent should be conclusive evidence that all the covenants had been performed, the purchaser was precluded from objecting that the lease had been forfeited by reason of dilapidations, which existed at the date of the contract (*c*). So, where there was a condition that the production of the last receipt for rent paid should be taken as conclusive evidence of the due and satisfactory performance of the lessee's covenants contained in the lease, or the waiver of any breaches up to completion, whether the lessor should be cognizant of such breaches or not, it was held by the House of Lords in a recent case, on a question arising out of a reference as to title in an action for specific performance, that the purchaser could not object to the title on the ground that there was such a continuing breach of a covenant as might render the property liable to immediate forfeiture (*d*). It is conceived that the principles of *construction* in such a case are the same, whether the condition has to be considered on the question of specific performance, or on a reference as to title. A difficulty of this kind has often arisen upon the covenant to insure against fire. Where there has been merely a past omission to insure, but the existing insurance is according to the terms of the covenant, the condition as to waiver may be relied on; but where the existing insurance is improperly effected (*e*), there is a continuous breach *de die in diem* of the covenant to insure and keep insured in the specified manner, and the sufficiency

Production of last receipt for rent.

Where there has been a breach of the covenant to insure.

(*b*) *Pegler* v. *White*, 33 B. 403.
(*c*) *Bull* v. *Hutchens*, 32 B. 615.
(*d*) *Lawrie* v. *Lees*, 7 Ap. Ca. 19.
(*e*) See *Penniall* v. *Harborne*, 11 Q. B. 368; *Havens* v. *Middleton*, 10 Ha. 641.

of the condition may be open to serious question (*f*). We may remark that the omission for a single day to pay the premium within the time allowed by the office is a breach of covenant inducing a forfeiture; and is not cured by the subsequent acceptance of the premium by the office (*g*). But *bonâ fide* purchasers were, by Lord St. Leonards' Act, 22 & 23 Vict. c. 35 (*h*), protected against forfeiture of the lease, by reason of a prior breach of the covenant to insure, if they had a receipt for the last payment of rent, and there was a valid insurance on foot at the time of completing the purchase; and it was held that if the breach had been committed since the passing of the Act, the Court had power under the 4th section to relieve against the forfeiture, notwithstanding that the covenant broken was entered into previously to the Act (*i*): but a vendor, in the absence of a condition to that effect, could not compel a purchaser to rely upon this section of the Act (*j*). These sections have been repealed by the Conveyancing Act, 1881 (*k*), which contains large provisions for relief against forfeiture, and places the covenant to insure on the same footing as all other covenants (*l*), except that to pay rent, to which the Act does not apply (*m*).

Now remedied by the 22 & 23 Vict. c. 35.

If a waiver, either express, or made sufficient by the conditions, be relied on by the vendor, and the landlord giving it is a different person from the original lessor, a condition precluding investigation of the lessor's title will not preclude the purchaser from requiring the title to be traced from the original lessor to the person whose waiver of the breach of covenant is relied on (*n*).

Title of reversioner when to be shown in case of waiver.

When leasehold property is sold in lots, it is also necessary

As to apportionment of

(*f*) *Howell* v. *Kightley*, 21 B. 331. As to the case of breach of a covenant not to underlet, and waiver of such breach where continuing, see *Walrond* v. *Hawkins*, L. R. 10 C. P. 342.

(*g*) *Wilson* v. *Wilson*, 14 C. B. 616; *Job* v. *Banister*, 2 K. & J. 374; affd. 5 W. R. 177. The Crown can waive a forfeiture by acceptance of rent; *Bridges* v. *Longman*, 24 B. 27; *Davenport* v. *Reg.*, 3 Ap. Ca. 115.

(*h*) Sects. 4—9.

(*i*) *Page* v. *Bennett*, 2 Gif. 117; 6 Jur. N. S. 419.

(*j*) *Turner* v. *Marriott*, V.-C. K., 31 July, 1866.

(*k*) Sect. 14, sub-sect. 7.

(*l*) Sect. 14, sub-sects. 1, 2.

(*m*) Sect. 14, sub-sect. 8.

(*n*) *Turner* v. *Marriott*, *suprà*.

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rent and liabilities on sale in lots.

to provide for the apportionment of the rents and liabilities under the lease (*o*). This cannot be done effectually where, as is usually the case, the lessor refuses, or is incompetent, to concur. Underleases, (the original term being retained either by the vendor or one of the purchasers,) with covenants for mutual indemnity, are frequently resorted to; in fact, necessarily so, where, in the case of buildings, the original lease contains a covenant to insure against fire in a given sum: and in such a case, the assignee of the lease must covenant to indemnify the other purchasers against any breach of the covenants of the original lease in respect of any part of the property (*p*). Cross powers of distress and entry are often relied on in other cases: but the plan proposed, whatever it be, should be stated in the conditions (*q*). The same point arises on a resale, in parcels, of freehold land which has been sold subject to a reserved rent and covenants.

On sale of renewable leaseholds.

Upon the sale of renewable leaseholds, it will probably be necessary to provide against the production of the title prior to the subsisting lease (*r*).

On sale of a reversion.

Upon the resale of a reversion, it may often be prudent to provide, that no evidence shall be required of the sufficiency of the consideration paid on the original purchase (*s*); if such purchase, however, were by auction, or were subsequent to 1st January, 1868, the condition would seem to be unnecessary (*t*).

Condition as to fire insurance.

On a sale of property which includes buildings, it was not unusual to insert a condition to the effect that the purchaser should have the benefit of any subsisting insurance, in the event of the buildings being burnt down

(*o*) See *Taylor* v. *Martindale*, 1 Y. & C. C. C. 658; *Bannuell* v. *Harris*, 1 Taun. 430; *Boules* v. *Waller*, Hay. 441 (where a receipt by a Crown collector was held to be evidence of apportionment); and see note to *Warren* v. *Bateman*, Fl. & K 455.

(*p*) *Brown* v. *Paull*, 2 Jur N. S. 317.

(*q*) See 1 Dav. 545.

(*r*) *Vide post*, p. 332.

(*s*) See *Bosuell* v. *Mendham*, 6 Mad. 373; see now 31 V. c. 4; *post*, p. 844 *et seq.*

(*t*) *Shelley* v. *Nash*, 3 Mad. 232; see *post*, p 850.

pending completion. Having regard, however, to the recent cases on the subject (*u*), which have laid down that a fire insurance contract is nothing more than a contract for mere personal indemnity, the effect of such a condition would seem to be, to expose the vendor to the double danger of having to hand over the insurance money to the purchaser under the contract, and at the same time of being liable to refund to the insurance company an equivalent amount of the purchase-money. The purchaser has, as from the date of the contract, an insurable interest; and the better plan, therefore, is to stipulate that the property shall, as respects all insurable loss or damage, be at the sole risk of the purchaser as from the date of the contract. To make no stipulation at all is not safe, since the purchaser would seem to have a sufficient interest in the property to enable him to demand the reinstatement of the premises (*x*), although he cannot claim the insurance money (*y*). If the premises should have been reinstated in compliance with such demand, and the full purchase-money were then paid to the vendor, it would seem to follow, from what has been above stated, that on the doctrine of subrogation the insurance company would be entitled to recover an equivalent amount out of the purchase-money.

As to covenants on sale by trustees, &c.

Although it is a general rule that a trustee or mortgagee, &c., enters into no covenant for title except that against incumbrances (*z*), it is usual, and on that account perhaps expedient, to insert a special condition to that effect.

(5.) *General remarks on special conditions.*

Section 5.

General remarks on special conditions.

Upon sales by trustees, mortgagees, and other persons filling a fiduciary character, great care is requisite in the use

(*u*) *Darnell* v. *Tibbitts*, 5 Q. B. D. 560, *Castellain* v. *Preston*, 11 Q. B. D. 380; and see *post*, p. 913.

(*x*) 14 Geo. 3, c. 78, s. 83; *Ex p. Gorely*, 4 D. J. & S. 477.

(*y*) *Rayner* v. *Preston*, 18 Ch. D. 1.

(*z*) See *Worley* v. *Frampton*, 5 Ha. 560; and see *ante*, pp. 94, 146.

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As to use of special conditions by trustees, &c.

of special conditions; since, if improperly used, they may not only involve the vendors in personal liability to their *cestuis que trust*, &c. (*a*), but also prevent their making a good title.

When it amounts to breach of trust.

In order to have this effect, the conditions must be unnecessary, and of such a depreciatory character that their use amounts to a breach of trust: it may, however, often be difficult to determine whether a given condition comes within this definition (*b*).

Use of certain special conditions by mortgagee approved of.

Upon a sale by a mortgagee, the use of conditions compelling a purchaser to take all objections within twenty-one days from the delivery of the abstract, that all copies of deeds, &c., not in the vendor's possession, should be obtained at the expense of the purchaser, that any mis-statement, &c., should not annul the sale but be the subject of compensation, and that the vendor might resell on breach of conditions by the purchaser, was considered by Lord Langdale to form no objection to the title (*c*).

Upon a sale by a mortgagee, with a title believed to be marketable, although complicated, the use of a condition authorizing the mortgagee, in the event of objections, &c., being taken which he could not remove, to rescind the contract on returning deposit, interest, and costs, and of a condition that purchasers, whose purchase-money should not amount to a specified sum, should pay for their abstracts, (except the abstract of the mortgage deed,) was sanctioned by the late Mr. Duval. The former condition has since been

(*a*) See *Dance* v. *Goldingham*, 8 Ch. 902; *Dunn* v. *Flood*, 28 Ch. D. 586, and *vide post*, p. 199.

(*b*) As to special conditions generally, see remarks of the M. R. in *Hoy* v. *Smythies*, 22 B. 510; *Greaves* v. *Wilson*, 25 B. 290; and as to depreciatory conditions, see *Falkner* v. *Equitable Rev. Soc.*, 4 Dr. 352; *Rede* v. *Oakes*, 4 D. J. & S. 505; and *ante*, p. 83.

(*c*) *Hobson* v. *Bell*, 2 B. 17, *Borell* v. *Dann*, 2 Ha. 443, 445; *Groom* v. *Booth*, 1 Dr. 548; and see now Conv. Act, 1881, s. 3, sub-s. 3, and s. 66.

held to be one which a prudent owner would introduce, and therefore binding on the mortgagor (*d*).

As to title, &c., should be adapted to particular title.

Conditions restrictive of a purchaser's right to a marketable title, or the ordinary evidences of title, should be used only so far as may be requisite from the state of the title (*e*). Where, on a sale by trustees, it was stipulated that the purchaser should accept a seventeen years' title as to part of the property, and the condition did not specify that the portion so restricted in title was only of small extent as compared with the whole, and not essential to the enjoyment of the property, it was considered doubtful whether such sale would be binding on the *cestui que trust* (*f*).

Where a deed dated in 1819 which formed the root of title, had been mislaid, and the vendors who were trustees for sale stipulated that the title should commence with a deed dated in 1858, and that no earlier title should be called for except at the purchaser's expense, and without stating, as was the fact, that the title, as commencing in 1819, was recited in the deed of 1858, the condition was held to be depreciatory, and, at the instance of a *cestui que trust* who had only a small interest, the completion of the sale was restrained (*g*). The trustees ought to have commenced their title with the deed of 1819, and to have stipulated for the verification of the abstract by means of a copy of the deed; or by making the recitals in the deed of 1858 evidence.

Power to sell under special conditions: its effect.

Powers of, and trusts for, sale, at the present day, usually authorize a sale "under special conditions as to title, evidence of title, expenses, or otherwise." Such an authority may reasonably be supposed to give to a fiduciary vendor, somewhat wider limits than he would otherwise enjoy, and would

(*d*) *Falkner* v. *Equitable Rev. Soc.*, 4 Dr. 352.

(*e*) *Ante*, p. 83; see, however, *Borell* v. *Dann*, 2 Ha. 443, 455.

(*f*) *Rede* v. *Oakes*, 4 D. J. & S. 505.

(*g*) *Dance* v. *Goldingham*, 8 Ch. 902; and see *Dunn* v. *Flood*, 28 Ch. D. 586; *Re Rayner's Trustees and Greenaway*, 53 L. T. 495.

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probably turn the scale in a doubtful case; but it is hard to say what is its precise effect. It certainly would not authorize capricious or obviously unnecessary conditions, and necessary or provident conditions may and should be used *without* an express authority; and, looking to the present state of practice, it must be a very gross case in which a willing purchaser could be advised to insist upon the use of depreciatory conditions as an objection to the title: it has, however, become usual to insert in such trusts and powers a declaration, that the use of unnecessary or improper conditions shall not affect the sale; but even such a declaration does not relieve a fiduciary vendor from liability to his beneficiaries.

As to declaration that improper conditions, &c., shall not affect purchaser.

Restrictive conditions do not necessarily protect a purchaser from notice of what might be learnt by inquiry.

We may here remark that the circumstance of an estate being sold under conditions restrictive of the title, does not necessarily protect a purchaser from being affected with implied notice of matters, which he would have discovered by the ordinary investigation which follows an open contract (*h*).

Condition as to modifying sale plan on sale of building estate.

Upon a sale of an estate laid out as building land, it may often be desirable to reserve power for the vendor to modify the arrangements indicated by the sale plan, for the laying out of the land, and the formation of roads and other accommodation works, in case any of the lots remain unsold.

Condition as to misdescriptions useless to trustees, &c.

The condition as to compensation for misdescription by the vendor, cannot, it appears, be enforced upon a sale by trustees, &c. (*i*): although the use of the condition may not in itself be a breach of trust (*k*).

Specific performance under special conditions.

In a modern case, the Court decreed specific performance of a contract for sale by trustees, in which it was provided

(*h*) *Peto* v. *Hammond*, 30 B. 495; *Morland* v. *Cook*, 1 Eq. 252; *Patman* v. *Harland*, 17 Ch. D. 353.

(*i*) *White* v. *Cuddon*, 8 C. & F. 766.

(*k*) See *Hobson* v. *Bell*, 2 B. 17; and cf. *Dunn* v. *Flood*, 28 Ch. D. 586, 591.

that their receipts should be sufficient discharges for the purchase-money, and that the purchaser should not require the concurrence of the *cestuis que trust*,—thus supplying the omission of the ordinary receipt clause in the trust instrument (*l*).

Costs of consulting counsel allowed.

Fiduciary vendors are justified in laying the title and conditions of sale before counsel; and the costs of so doing by assignees in bankruptcy have been allowed as against an incumbrancer who had petitioned for the sale, but whose demand the proceeds of sale were insufficient to satisfy (*m*); and upon a sale by the Court of Chancery, the title is perused, and the conditions of sale are settled, by one of the conveyancing counsel of the Court, in all but very exceptional cases.

Power of trustees under V. & P. Act and Conv. Act, 1881.

By the Vendor and Purchaser Act (*n*), and the Conveyancing Act, 1881 (*o*), trustees who are vendors may sell without excluding the operation of the rules, which are prescribed by those Acts, for the future regulation of the obligations and rights of vendor and purchaser in the completion of contracts for the sale of land; but they might, it is conceived, have done so, even without express enactment.

Concluding remarks on special conditions.

Lastly, it may be remarked, that those conditions which to an unprofessional eye appear the simplest, are often the most dangerous; and those which appear difficult and complex to the unlearned purchaser may not unfrequently produce an impression favourable to the title upon the mind of his legal adviser. The conveyancer who, upon the purchase of a large estate, peruses a series of special stipulations, which have evidently been framed with reference to points which might be made matters of serious

(*l*) *Wilkinson* v. *Hartley*, 15 B. 183; and see *Groom* v. *Booth*, 1 Dr. 548.

(*m*) *Ex parte Lewis*, 3 M. D. & D. 173.

(*n*) 37 & 38 V. c. 78, s. 3.

(*o*) Sect. 66.

annoyance by a litigious, but are of little practical importance to the willing, purchaser, is naturally disposed to believe that no real difficulties exist where minor objections have been so carefully anticipated: and, on the other hand, nothing is more common than to see conditions whose concise simplicity disarms the suspicion of the unprofessional reader, but whose sweeping clauses reduce counsel to the dilemma of either advising a client to complete under serious uncertainty whether he will acquire even a tolerably safe holding title, or of involving him in inquiries, which are almost sure to be heavily expensive, and may probably prove wholly unsatisfactory. The writer may also be allowed to add, as the result of a somewhat wide experience, that, in his opinion, the number of seriously defective and dangerous titles which at the present day are brought into market and passed off upon purchasers under the cover of special conditions of sale, is much larger than is commonly supposed.

CHAPTER V.

AS TO THE SALE AND MATTERS CONNECTED THEREWITH.

1. *Auction, what it is.*
2. *Auctioneer, his liabilities, power, and remuneration.*
3. *Agent, his liabilities, power, and remuneration.*
4. *The deposit.*
5. *As to puffings and reserved biddings on a sale by auction.*

Section 1.

Auction; what it is.

Direction to sell by.

(1). An auction, in the widest sense of the term, is any mode of sale, however conducted, in which the vendor comes under an express or implied obligation to part with the property to the highest bidder: a general direction to sell by auction, would, however, it is conceived, only authorize a sale by auction in the usual mode.

Section 2.

As to the auctioneer, &c.

auctioneer, when personally liable.

(2.) *As to the Auctioneer, &c.*

An auctioneer selling without sufficient authority (*a*), or not disclosing the name of his principal, is liable, upon the well-known principle laid down in *Collen* v. *Wright* (*b*), to the purchaser for his costs, and interest on his purchase-money if lying idle (*c*): and it has been held that if he sell, without at the time of sale disclosing the name of his principal, he is personally liable in damages for non-performance of the contract (*d*). If, being aware of the purchaser's mistake, he fail to correct it (*e*), or, if he know-

(*a*) As to acts by the vendor binding him to the sale, see *Pike* v. *Wilson*, 1 Jur. N. S. 59. An auctioneer has no implied authority to warrant title or quality; *Payne* v. *Lord Leconfield*, 51 L. J. Q. B. 642; *Wood* v. *Baxter*, 49 L. T. 45. As to the scope of his authority, see *Mullens* v. *Miller*, 22 Ch. D. 194; Story on Agency, sects. 27, 107; and as to the general authority of an agent to warrant, see Benjamin, 616 *et seq.*

(*b*) 8 E. & B. 647; see p. 657.

(*c*) *Bratt* v. *Ellis*, and *Jones* v. *Dyke*, Sug. 82, 813. See *Gaby* v. *Driver*, 2 Y. & J. 549; *Wood* v. *Baxter*, *suprà*.

(*d*) *Hanson* v. *Roberdeau*, Pea. N. P. 120; *Franklyn* v. *Lamond*, 4 C. B. 637; *Ex p. Hartop*, 12 V. 352; Sug. 42; and see *Woolfe* v. *Horne*, 2 Q. B. D. 355.

(*e*) *Dyas* v. *Stafford*, 7 L. R. Ir. 590.

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ingly accept fictitious biddings (*f*), and an action is brought for the rectification or rescission of the contract, he may, if joined as defendant, be ordered to pay costs; but an issue as to whether his co-defendant, the vendor, authorized him to make a statement which is alleged to be misleading, cannot be tried under the third party procedure (*ff*).

May be himself the vendor.

The fact of his being, unknown to the purchaser, the owner of the property, seems to form no objection to the validity of the contract (*g*).

Cannot vary terms after sale.

The auctioneer cannot, without express authority, delegate the sale to another (*h*); nor can he, either before (*i*) or after (*j*) the sale, vary the terms of the contract: whether without express authority he can bind the vendor by special conditions of sale, seems to be doubtful (*k*). Where he professes to sell as "without reserve," it has been held at Law, that if he accepts a bid from the vendor, he commits a breach of contract with the purchaser, for which he may be made liable in damages (*l*).

Rights and liabilities of, in respect to deposit and purchase-money.

Unless especially authorized, he has no power to receive more than the deposit (*m*). In respect of money which he is authorized to receive, he is in a fiduciary position, and may come within the Debtors Act, 1869 (*mm*); and if, as respects the deposit or any other part of the purchase-money which he is

(*f*) *Heatley* v. *Newton*, 19 Ch. D. 326.

(*ff*) *Catton* v. *Bennett*, 26 Ch. D. 161.

(*g*) *Flint* v. *Woodin*, 9 Ha. 618.

(*h*) *Cockran* v. *Irlam*, 2 M. & S. 301; *Catlin* v. *Bell*, 4 Camp. 183; *Schmaling* v. *Thomlinson*, 6 Taun. 147; see *Coles* v. *Trecothick*, 9 V. 251; *Henderson* v. *Barnewall*, 1 Y. & J. 387; Sug. 44.

(*i*) *Jones* v. *Nanney*, 13 Pr. 76.

(*j*) See *Blackburn* v. *Scholes*, 2 Camp. 343.

(*k*) *Pike* v. *Wilson*, 1 Jur. N. S. 59; *Denew* v. *Daverell*, 3 Camp. 451; and it seems to be the intention of the Solicitors' Remuneration Act, 1881, that the auctioneer shall be responsible for the conditions of sale; see Sched. I. Pt. I. r. 11; *Re Wilson*, 29 Ch. D. 790; *Re Merchant Taylors' Co.*, 30 Ch. D. 28; cf. *Re Faulkner*, W. N. (1887), 167.

(*l*) *Warlow* v. *Harrison*, 1 E. & E. 295; and cf. *Mainprice* v. *Westley*, 6 B. & S. 420; *Heatley* v. *Newton*, 19 Ch. D. 326.

(*m*) *Sykes* v. *Giles*, 5 M. & W. 645.

(*mm*) *Crowther* v. *Elgood*, 34 Ch. D. 691.

authorized to receive, he allow the purchaser to retain it on his personal or any other security, he does so at his own risk (*n*); nor where he is authorized to receive payment, is he justified in taking a bill of exchange instead of cash (*o*); but he may take the purchaser's cheque in lieu of cash (*p*); if he accepts the purchaser's I O U for the money, even though he does so with the vendor's consent, it seems that he may sue upon it in his own name (*q*). On a sale of *goods* he may recover the entire price from the purchaser (*r*).

Holds the deposit as a stakeholder.

Until the purchase is completed he is a stakeholder of the deposit, and should not part with it except by consent of both vendor and purchaser (*s*); if both claimed it, he might file a bill of interpleader (*t*); but, in so doing, he must not claim to retain his commission out of it (*u*), nor must the amount held by him form a question in dispute (*x*); if, however, he be made a defendant to an action for specific performance, and the deposit be brought into Court, he will be allowed to deduct his charges and expenses, subject to the question as to who shall ultimately bear them (*y*); but

(*n*) *Williams* v. *Millington*, 1 H. Bl. 81, 85; *Wiltshire* v. *Sims*, 1 Camp. 258; Sug. 48.

(*o*) *Sykes* v. *Giles*, 5 M. & W. 645; *Williams* v. *Evans*, L. R. 1 Q. B. 352.

(*p*) *Farrer* v. *Lacy-Hartland*, 31 Ch. D. 42.

(*q*) *Cleave* v. *Moors*, 3 Jur. N. S. 48.

(*r*) *Williams* v. *Millington*, 1 H. Bl. 81; *Robinson* v. *Rutter*, 4 E. & B. 954.

(*s*) See *Smith* v. *Jackson*, 1 Mad. 620; *Burrough* v. *Skinner*, 5 Burr. 2639; and *Wyggins* v. *Lord*, 4 B. 30, where the deposit was received by the vendor's solicitor; but see *Edgell* v. *Day*, L. R. 1 C. P. 80, where the vendor's solicitor receiving the deposit was held not to be a stakeholder. And see *Biggs* v. *Bree*, 51 L. J. Ch. 263, where the auctioneer paid the deposit to the solicitor having conduct of the sale for the purpose of its being paid into Court, and the solicitor misappropriated it, and it was held that the auctioneer was not liable to repay it.

(*t*) *Fairbrother* v. *Prattent*, Dan. 64; Dan. Ch. Pr. p. 1518. If an action has been brought to recover the deposit, he may, it is conceived, take out an interpleader summons under 1 & 2 Will. 4, c. 58; and 23 & 24 V. c. 126; now, R. S. C. 1883, O. LVII.

(*u*) *Mitchell* v. *Hayne*, 2 S. & S. 63; and see *Bignold* v. *Audland*, 11 Si. 28.

(*x*) *Diplock* v. *Hammond*, 2 S. & G. 141.

(*y*) *Annesley* v. *Muggridge*, 1 Mad. 593; *Yates* v. *Farebrother*, 4 Mad. 239. As to the joinder of agents as co-defendants generally, and the disapproval by Sir G. Jessel of the practice, see *Mathias* v. *Yetts*, 46 L. T. 497, 502.

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where the deposit is of small amount, he ought not to be made a defendant, unless he refuses to pay it into Court (z). If the contract be rescinded by the purchaser on the ground of fraudulent misrepresentations made by the vendor to the auctioneer, and innocently communicated by the latter, the fraud will be a good defence to an action by the vendor against the auctioneer for the deposit or purchase-money (a). If the estate be re-sold by the vendor, upon the alleged default of the first purchaser, the auctioneer receiving the deposits on both sales cannot in one suit get rid of the conflicting claims of the vendor and two purchasers (b). In such a case he should pay the money into Court under the Trustee Relief Act, and would be allowed his necessary costs of doing so.

Whether allowed costs out of, at Law.

At Law, the costs of an auctioneer who has paid the deposit into Court under an interpleader order (c), have been allowed out of the deposit; leaving the purchaser to his remedy over against the vendor, although known to be insolvent (d): but in a modern case the Court refused the interpleader order, unless the auctioneer gave security for costs, and declined to allow him the costs of the application (e).

Rights of, &c. as to deposit after completion.

After the purchase is completed, or before with the consent of the purchaser, the auctioneer may, except in very special cases (f), safely pay the deposit to the vendor, although in embarrassed circumstances (g): if the purchase

(z) *Earl of Egmont* v. *Smith*, 6 Ch. D. 469; but if he is joined in an action for rescission, he must submit to give the plaintiff all the relief, to which he can in any event be entitled against him, before he can be dismissed from the suit; *Heatley* v. *Newton*, 19 Ch. D. 326.

(a) See *Murray* v. *Mann*, 2 Ex. 538; *Stevens* v. *Legh*, 2 C. L. R. 251.

(b) *Hoggart* v. *Cutts*, Cr. & Ph. 197.

(c) Under the 1 & 2 Will. 4, c. 58; see now R. S. C., 1883, O. LVII.

(d) *Pitchers* v. *Edney*, 4 Bing. N. C. 721; and see *Reeves* v. *Barraud*, 7 Sc. 281.

(e) *Deller* v. *Prickett*, 15 Q. B. 1081.

(f) See *Crosskey* v. *Mills*, 1 C. M. & R. 298, 302.

(g) *White* v. *Bartlett*, 9 Bing. 378. As to the case of sales under order of the Court, see *Biggs* v. *Bree*, 51 L. J. Ch. 263.

go off, or the vendor fail to make a title (*h*), the purchaser may, and perhaps without giving notice of default (*i*), recover the deposit from the auctioneer in an action at Law (*k*); but he cannot, nor can the vendor, claim interest, although the auctioneer may actually have made a profit upon it, and been required by one only of the parties to invest it (*l*).

Commission.

The amount of his remuneration, unless (as it ought to be) it is settled by agreement (*m*), seems to depend upon custom (*n*); and even in the trade there appears to be no settled rate of commission. In one case (*o*) the usual charge was by several auctioneers stated to be £5 per cent. up to the first £500 of purchase-money; by others, up to the first £1,000; and by most of the witnesses, up to the first £2,000, with £2 10*s*. per cent. on the remainder. An agreement that the auctioneer shall receive nothing if there be no sale, will not deprive him of his commission, if, after he has taken the usual steps preparatory to a sale, the estate be sold by the owner by private contract (*p*): but where an agent was to receive £100 for commission, "one-third down and the remaining two-thirds when the abstract of conveyance is drawn out," and an abstract of title was delivered, but the contract then went off, he was not allowed to recover from his principal the two-thirds which remained unpaid (*q*). Where a solicitor employed an auctioneer to sell his client's property, who retained out of the deposit, for his commission, more than would be allowed under the Bankruptcy scale, the solicitor was nevertheless allowed the whole charge on the taxation of his bill (*r*).

(*h*) *Gray* v. *Gutteridge*, 1 Man. & R. 614; *Edwards* v. *Hodding*, 5 Taun. 815.

(*i*) *Gray* v. *Gutteridge*, *ubi sup.*; *Duncan* v. *Cafe*, 2 M. & W. 244.

(*k*) *Burrough* v. *Skinner*, 5 Burr. 2639; *Maberley* v. *Robins*, 5 Taun. 625; *Johnson* v. *Roberts*, 24 L. T. 254.

(*l*) *Harington* v. *Hoggart*, 1 B. & Ad. 577; *Lord Salisbury* v. *Wilkinson*, 3 Br. C. C. 44; *Browne* v. *Southouse*, *ibid.* 107; and see *Gaby* v. *Driver*, 2 Y. & J. 549.

(*m*) *Re Page*, 32 B. 487.

(*n*) See *Maltby* v. *Christie*, 1 Esp. 340.

(*o*) *Re Page*, *suprà*.

(*p*) *Rainy* v. *Vernon*, 9 C. & P. 559; *Driver* v. *Cholmondeley*, *ibid.* n.

(*q*) *Alder* v. *Boyle*, 4 C. B. 635.

(*r*) *Re Page*, *suprà*.

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Claim to, defeated by negligence.

And the auctioneer's (or agent's) claim to remuneration will be defeated by any negligence on his part, as to the mode of conducting the sale or otherwise, whereby the sale is defeated (*s*): and if he negligently misdescribe the property, he will be liable to repay to the vendor the amount claimable by the purchaser in respect of such misdescription (*t*); and he may be liable in nominal damages for breach of duty, though no actual loss may have been sustained (*u*). An executor or trustee (*x*) or mortgagee with power of sale (*y*), acting as auctioneer in the sale of the trust or mortgaged property, cannot charge commission, unless it can be collected from the trust instrument or mortgage that such was the intention (*z*).

Trustee, &c., cannot claim commission.

Insolvent—loss falls on vendor.

As a general rule, any loss occasioned by his insolvency or *mala fides* falls on the vendor as his employer (*a*); and a mortgagee, adopting his mortgagor's contract for sale, adopts also this liability, as between himself and the purchaser (*b*), though not as between himself and the mortgagor, where the money is misappropriated by the mortgagor's agent, even though acting also for the mortgagee (*c*); but a fiduciary vendor will not be personally responsible to his *cestuis que trust* for such loss, if he have acted prudently and under proper advice in the matter (*d*).

(*s*) *Denew* v. *Daverell*, 3 Camp. 451; *Jones* v. *Nanney*, 13 Pr. 76.

(*t*) *Parker* v. *Farebrother*, 1 C. L. R. 323.

(*u*) *Hibbert* v. *Bayley*, 2 F. & F. 48.

(*x*) *Kirkman* v. *Booth*, 11 B. 273.

(*y*) *Mathison* v. *Clarke*, 3 Dr. 3. When the sale is under the direction of the Court commission may be allowed; *Arnold* v. *Garner*, 2 Ph. 231.

(*z*) *Douglas* v. *Archbutt*, 2 D. & J. 148; but see *Miller* v. *Beal*, 27 W. R. 403, in which an auctioneer selling under a bill of sale held by himself was allowed to charge his commission; and *Re Donaldson*, 27 Ch. D. 544, where a solicitor mortgagee was held entitled to profit costs of enforcing his security against the mortgagor.

(*a*) See and consider *Sanderson* v. *Walker*, 13 V. 601, 602; *Fenton* v. *Browne*, 14 V. 144, 150; *Annesley* v. *Muggridge*, 1 Mad. 593, 596; *Smith* v. *Jackson*, *ibid.* 618, 620; Sug. 52.

(*b*) *Rowe* v. *May*, 18 B. 613.

(*c*) *Barrow* v. *White*, 2 J. & H. 580.

(*d*) *Edmonds* v. *Peake*, 7 B. 239.

Is agent for both parties within the Statute of Frauds.

By the appointment of an auctioneer the vendor impliedly authorizes the auctioneer or his clerk (*e*) to bind him by their signatures as his agents within the Statute of Frauds (*f*); a similar authority is given by the bidder, by the act of bidding (*g*), although it be by an agent (*h*). Before the fall of the hammer, either party may revoke the authority (*i*); but not after the property has been knocked down, even though no contract may have been signed (*k*). Whether an action would lie for such revocation is doubtful.

Revocation of his authority.

Selling by private contract at the reserved price.

Where property was offered for sale by auction under order of the Court, and was bought in, but before the auctioneer had left the room a person, to whom he had communicated the reserved price, signed a contract for the purchase at that price, it was held that the auctioneer had not exceeded his authority, and the contract was enforced (*l*).

Revocation of his authority.

Where the auctioneer's authority has been revoked by the vendor before the sale, such revocation is valid even as against parties purchasing in ignorance of it (*m*); but of course the vendor may estop himself by conduct from setting up such revocation.

His right to sue party for whom he signs as agent.

It seems to be doubtful whether the Statute of Frauds does not prevent an auctioneer from suing a purchaser for whom he personally signs as agent (*n*); but he can maintain the action when the entry has been made by his clerk on behalf of the defendant (*o*).

(*e*) *Bird* v. *Boulter*, 1 N. & M. 313; *Bartlett* v. *Purnell*, 4 A. & E. 792; *Henderson* v. *Barnewall*, 1 Y. & J. 387; and see as to this passage, *Dyas* v. *Stafford*, 7 L. R. Ir. 590.

(*f*) *Emmerson* v. *Heelis*, 2 Taun. 38; *Kenworthy* v. *Schofield*, 2 B. & C. 945; *Kemeys* v. *Proctor*, 1 J. & W. 350. See and consider *Beer* v. *London and Paris Hotel Co.*, 20 Eq. 412.

(*g*) See Sug. 43.

(*h*) *Emmerson* v. *Heelis*, 2 Taun. 38; *White* v. *Proctor*, 4 Taun. 209; *Gardiner* v. *Tate*, 10 Ir. R. C. L. 460.

(*i*) See *Blagden* v. *Bradbear*, 12 V. 466; *Mason* v. *Armitage*, 13 V. 25; *Malins* v. *Freeman*, 2 Ke. 25; *Taplin* v. *Florence*, 10 C. B. 744; *post*, p. 216.

(*k*) *Day* v. *Wells*, 30 B. 220.

(*l*) *Else* v. *Barnard*, 28 B. 230.

(*m*) *Manser* v. *Back*, 6 Ha. 443.

(*n*) *Farebrother* v. *Simmons*, 5 B. & Ald. 333; *Wright* v. *Dannah*, 2 Camp. 203.

(*o*) *Bird* v. *Boulter*, 1 N. & M. 313; see *Graham* v. *Musson*, 5 Bing. N. C. 603, 608.

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(3.) *As to agents.*

As to agents.

Agent.

An agent, either for purchase (*p*) or sale (*q*) of an estate may be appointed by word of mouth, even where the contract is required to be in writing by the Statute of Frauds (*r*); but a verbal appointment, of course, is generally inexpedient: neither of the contracting parties can, it appears, act as agent within the meaning of the Statute of Frauds for the other (*s*); nor can the seller's agent act as such agent for the buyer, unless expressly authorized by the latter (*t*).

How appointed.

Private instructions to.

Where the agent has a written authority, parties dealing with him upon the faith of it are unaffected by private restrictions imposed upon him by his principal, but of which they have no notice (*u*). Nor can a contract, when duly entered into by an agent, be avoided by his neglect to communicate it to his principal pursuant to the latter's instructions (*x*).

General authority, what it includes.

Wherever a general authority is given by a principal to an agent, this implies and includes a right to do all subordinate acts incident to and necessary for the execution of that authority,—and if notice is not given to the person with whom the agent deals that the principal has limited the authority, the principal is bound (*y*). And where the authority is special, the principal may be bound by estoppel by conduct (*z*). But an estate agent instructed as to price has no implied authority to sign an open contract on behalf of his principal (*a*).

(*p*) Sug. 145.

(*q*) Sug. 146.

(*r*) See *Coles* v. *Trecothick*, 9 V. 250; *Dyas* v. *Cruise*, 2 J. & L. 460; *Shaw* v. *Foster*, L. R. 5 H. L. 321; *Cave* v. *Mackenzie*, 46 L. J. Ch. 564.

(*s*) *Wright* v. *Dannah*, 2 Camp. 203; *Farebrother* v. *Simmons*, 5 B. & Ald. 333; *Sharman* v. *Brandt*, L. R. 6 Q. B. 720.

(*t*) *Durrell* v. *Evans*, 7 Jur. N. S. 585.

(*u*) *Neeld* v. *Duke of Beaufort*, 5 Jur. 1123; *National Bolivian Co.* v. *Wilson*, 5 Ap. Ca. 176, 209; see as to restrictions on an auctioneer, *Mansel* v. *Back*, 6 Ha. 443.

(*x*) *Wright* v. *Bigg*, 15 B. 592.

(*y*) Per M. R. in *Collen* v. *Gardner*, 21 B. 542.

(*z*) Story, Ag. s. 90 *et seq.*

(*a*) *Hamer* v. *Sharp*, 19 Eq. 108; *Prior* v. *Moore*, 3 Times L. R. 624.

Apparent agent.

Also a person may so deal with third parties, as to warrant them in the belief that another is his agent; and he will, at least in Equity, be bound by any unauthorized agreement of the agent, which he (the principal) has given them reason to consider authorized (*b*).

For purchaser, how far he can bind his principal.

An agent, employed to bid for an estate, and not limited as to price, can bind his principal to any amount; if, being limited, he exceed the limit, and his want of authority be unknown to the other party, he himself is bound (*c*), and his principal is said to be free (*d*); upon the general ground that he cannot bind his principal beyond the extent of his authority (*e*): but the production of written instructions authorizing him to give a specified price, does not preclude parol evidence of his having had a general discretionary power (*f*).

Agency, if denied, may be established.

As between the vendor and an alleged agent for purchase, but whose authority is denied, the agent has all the rights and liabilities of a principal: the fact of agency, if denied, may, of course, if practicable, be established, by the agent against the principal, by the principal against the agent (*g*), or by the vendor or purchaser against the other principal (*h*).

Contract by agent assuming to be

There is not, as a general rule, any objection to a contract for purchase entered into in the name of an agent,

But the authority under which he acts may give him this discretion; *Saunders* v. *Dence*, 52 L. T. 644.

(*b*) See *Smith* v. *East India Co.*, 16 Si. 76.

(*c*) See *Jones* v. *Downman*, 4 Q. B. 235, n.

(*d*) *Hicks* v. *Hanlin*, 4 Esp. 114; *East India Co.* v. *Hensley*, 1 Esp. 112; *Daniel* v. *Adams*, Amb. 498; *Ex p. Bennett*, 10 V. 400; Sug. 47. *Quære*, however, whether the rule should not be, that where the agent exceeds the limit, the principal shall be bound to the extent of such limit; provided, in the case of an auction, that it exceed the amount of the last adverse bidding.

(*e*) *Olding* v. *Smith*, 16 Jur. 497.

(*f*) *Hicks* v. *Hanklin*, 4 Esp. 116.

(*g*) *Taylor* v. *Salmon*, 4 M. & C. 134; *Dale* v. *Hamilton*, 2 Ph. 266; *Lees* v. *Nuttall*, 2 M. & K. 819; and see *Austin* v. *Chambers*, 6 C. & F. 1.

(*h*) See *Marston* v. *Roe*, 8 A. & E. 14; *post*, s. 4; and *Field* v. *Boland*, 1 D. & Wal. 37; *Wilson* v. *Hart*, 7 Taun. 296, *vide post*, p. 1072 *et seq.*, as to when an action must be brought in the agent's name.

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principal enforced.

By nominal agent, when enforced.

upon the ground of his having professed to deal on his own account (*i*); but in the converse case of a purchaser professing to contract as agent for another, Equity would refuse specific performance against the vendor, if it appeared that the name of the assumed principal was used as an inducement to a bargain, which would not otherwise have been entered into (*k*). Of course the real principal is liable, although he may have assumed to contract as an agent;—no other principal being named (*l*).

Where on a sale of goods by auction, a bidder in reply to the auctioneer gave his own name as the purchaser, but did not disclose that he was acting merely as agent, or sign any written contract, and there was evidence that the vendor knew he was only an agent, and the goods were delivered to the principal, the Court of Exchequer were equally divided in opinion, as to whether the agent was liable to the vendor in an action for goods sold and delivered (*m*).

Agreements by agent, how to be signed.

Agent when personally liable.

An agreement entered into by an attorney or agent, should, in order to avoid any question as to personal liability, be made and signed, by him, as attorney or agent, in the name of the principal (*n*); in fact, if a person by deed covenant for himself and his heirs for the acts of another, he is personally liable, although described as agent (*o*); it has, however, been held, that if a person enter into a contract in writing, not under seal, describing himself as agent and naming his principal, he is not personally liable, unless he had no authority to make the contract, or, in making it, exceeded his authority (*p*); but slight expressions, indicative

(*i*) Sug. 48: *Nelthorpe* v. *Holgate*, 1 Coll. 203; *Trent* v. *Hunt*, 9 Ex. 14; *Saxon* v. *Blake*, 29 B. 438.

(*k*) *Phillips* v. *Duke of Bucks*, 1 Vern. 227; *post*, p. 1182; Fry, ss. 207, 208.

(*l*) *Carr* v. *Jackson*, 21 L. J. Ex. 137.

(*m*) *Williamson* v. *Barton*, 2 F. & F. 544, 8 Jur. N. S. 341.

(*n*) See *Gray* v. *Gutteridge*, 1 Man. & R. 614, 618; *Humble* v. *Hunter*, 12 Q. B. 310; *Magee* v. *Atkinson*, 2 M. & W. 440; *et vide post*, p. 1074; Sug. 57.

(*o*) See *Appleton* v. *Binks*, 5 Ea. 148; Sug. 57.

(*p*) *Downman* v. *Jones*, 7 Q. B. 103.

of an intention to bind the agent, have been held to take a case out of the general rule, where the signature is in the name of the agent—although so described—and there is no ratification by the principal (*q*): even where a person, without authority, signs an instrument in the name of and as agent for another, he cannot be treated as a party to such instrument, and be sued upon it, unless he be shown to have been really the principal; although he may be liable in an action for damages for the misrepresentation, either on the ground of implied warranty, or of deceit (*r*): where the agent of the vendor, at the purchaser's request, signed the agreement in his (the agent's) own name, this was held not to be a sufficient agreement in writing under the Statute of Frauds, the vendor failing to prove that his agent signed as agent for the purchaser (*s*); so, where the seller's agent, in the presence of both the buyer and the seller, wrote out a sale note, containing the names of the parties, and, at the buyer's request, altered the date so as to give him longer credit, it was held that the buyer was not bound (*t*).

Powers of agent.

After the contract is entered into, an agent for sale, if and so long as his principal is undisclosed, may, within the limits of his original authority, vary the terms of payment (*u*): he cannot, without special authority, receive the purchase-money (*x*); if authorized to receive it, a direction from his

(*q*) *Tanner* v. *Christian*, 4 E. & B. 591; and cf. *Spittle* v. *Lavender*, 2 Br. & B. 452, where the agreement was ratified by the principal. See, too, *Reid* v. *Draper*, 7 Jur. N. S. 1125, a contract between brokers. The question is in all cases whether upon the construction of the contract the description of the party signing *as agent* is mere description, or whether it imports an intention to preclude personal liability; *Gadd* v. *Houghton*, 1 Ex. D. 357; *Hough* v. *Manzanos*, 4 Ex. D. 104; *Hutcheson* v. *Eaton*, 13 Q. B. D. 861, 865; *Pike* v. *Ongley*, 18 Q. B. D. 708; and see *Long* v. *Millar*, 4 C. P. D. 450.

(*r*) *Jenkins* v. *Hutchinson*, 13 Q. B. 744; *Lewis* v. *Nicholson*, 16 Jur. 1041; *Collen* v. *Wright*, 8 E. & B. 647; *Richardson* v. *Williamson*, L. R. 6 Q. B. 276; *Cherry* v. *Colonial Bank of Austral.*, L. R. 3 P. C. 24, 31; *Chapleo* v. *Brunswick Building Society*, 6 Q. B. D. 696; *Fairbank's Exors.* v. *Humphreys*, 18 Q. B. D. 54.

(*s*) *Graham* v. *Musson*, 5 Bing. N. C. 603.

(*t*) *Durrell* v. *Evans*, 7 Jur. N. S. 585.

(*u*) Sug. 46, 47; *Blackburn* v. *Scholes*, 2 Camp. 343.

(*x*) *Mynn* v. *Joliffe*, 1 Mo. & R. 326; *Pole* v. *Leask*, 28 B. 562; and see further, *post*, p. 746, as to payment to agents.

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principal to pay it to a third party cannot, if given for valuable consideration (*y*), be revoked without the consent of such third party. He is not bound to pay over to his principal money received under a contract which has been rescinded on the ground of fraud (*z*).

It was in a modern case decided in Scotland, that an agent contracting for a principal in insolvent circumstances, and failing to communicate the fact to the vendor, was personally responsible for his purchase-money: but on an appeal to the Lords the respondent's counsel deemed it useless to argue the point (*a*).

Commission.

If an agent for sale is to receive for commission a percentage on the sum obtained, he cannot claim it in respect of any part of the purchase-money which remains unpaid (*b*): unless such nonpayment be occasioned by the wilful act or default of the vendor (*c*): if several agents are employed, and one find, and another conclude, the bargain with a purchaser, each may claim a commission; but not the usual commission of £2 *per cent.* (*d*): and where a contract which the agent is commissioned to procure goes off owing to the principal's fault, the agent is entitled to commission (*e*). Where the purchaser having observed that a house was to be disposed of obtained from the agent a card to view, and having no further communication with the agent, who named a price which he thought too high, subsequently negotiated with a friend of the vendor and purchased at a lower price, the agent was held entitled to the commission, on the ground that the sale had been effected through his intervention (*f*).

(*y*) *Metcalfe* v. *Clough*, 2 Man. & R. 178; *Yates* v. *Hoppe*, 9 C. B. 541; see in Equity, *Rodick* v. *Gandell*, 1 D. M. & G. 763; *L'Estrange* v. *L'Estrange*, 13 B. 281; *Riccard* v. *Prichard*, 1 K. & J. 277.

(*z*) *Ante*, p. 206.

(*a*) *Dudgeon* v. *Thompson*, 1 Macq. 714.

(*b*) *Bull* v. *Price*, 7 Bing. 237.

(*c*) *S. C.*, p. 241; and *Cannon* v. *Kelly*, 1 H. & J. 655; and *Alder* v. *Boyle*, 4 C. B. 635.

(*d*) *Murray* v. *Currie*, 7 C. & P. 584.

(*e*) *Tribe* v. *Taylor*, 1 C. P. D. 505; and see, as illustrating the same principle, *Fisher* v. *Drewett*, 48 L. J. Ex. 32; and *Clack* v. *Wood*, 9 Q. B. D. 276.

(*f*) *Mansell* v. *Clements*, L. R. 9 C. P. 139; and see *Curtis* v. *Nixon*, 24 L. T. 706; *Bailey* v. *Chadwick*, 29

Whether entitled to remuneration where sale not effected.

In a modern case (*g*), where an agent was employed to find a purchaser at a certain price, on which he was to have a specified per-centage if a sale were effected, and the agent found a purchaser, but the vendor refused to complete the sale, it was held that the agent could sue on a *quantum meruit* for the work and labour done; and that in such a case the law implies a promise on the part of the vendor to remunerate the agent, even if the contract should not be completed: but two of the judges carefully disclaimed any intention of laying it down as a general rule, that when an agent is employed to sell, and his authority is revoked, he may resort to the common counts for remuneration for his services: the understanding being that he is to find a purchaser if he is to be entitled to his commission; and if he does not do so before his authority is revoked, he is to receive nothing (*h*).

Not entitled to commission unless he acts within his authority.

In order to entitle himself to commission the agent must strictly observe the letter of his authority. Thus, where A., the owner of certain pottery works, and B., the owner of a patented invention for earthenware, entered into an arrangement that if A. sold the works with the benefit of the patent annexed, he should be entitled to a specified remuneration, it was held that A. could not claim anything for effecting a sale of the works without the patent (*i*).

Corrupt commission.

It may be here observed that commission received by the agent of a purchaser from the vendor is in the nature of a bribe, and is a profit which the agent makes on account of the purchaser (*k*): and an agreement to pay such commission is bad on the ground of public policy, and cannot be

L. T. 429; *Wilkinson* v. *Alston*, 48 L. J. Q. B. 733.

(*g*) *Prickett* v. *Badger*, 1 C. B. N. S. 296.

(*h*) Per Williams and Crowder, JJ., ib.; cf. *Planché* v. *Colburn*, 8 Bing. 14; *De Bernardy* v. *Harding*, 8 Ex. 822; and see *Lumley* v. *Nicholson*, 34 W. R. 716.

(*i*) *Pelly* v. *Sidney*, 5 Jur. N. S. 793.

(*k*) *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. D. 394, 457.

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sued on, even though it be proved that the agent was not unduly influenced thereby (*l*).

Authority may be revoked at any time before agreement concluded;

The authority of an agent, either for sale or purchase, may be revoked at any time before he has entered into a binding agreement (*m*); and the revocation of his authority will not entitle him to claim the specific amount of remuneration, which had been agreed to be paid to him on a sale being effected: although it may entitle him at once to a *quantum meruit* for services actually rendered (*n*). If he act without authority, his alleged principal, even although he have had no previous communication with him, or were ignorant of his name at the date of the contract, may adopt his acts (*o*): and mere acquiescence with knowledge of the fact, but without any overt act of adoption, may raise a presumption of assent, and make the contract binding on the alleged principal (*p*); nor is it necessary that the principal should have been competent to contract at the date of the agreement; for instance, an administrator may adopt a contract entered into before the grant of the letters of administration (*q*); but this is because the title of the administrator vests by relation. And it is clear that ratification can only be by a principal in existence, either actually or in contemplation of law, and therefore not by a corporation not in existence at the date of the agreement (*r*): and so, a contract entered into by A., expressly

or unauthorized act adopted:

only by nominal principal.

(*l*) *Harrington* v. *Victoria Graving Dock Co*, 3 Q. B. D. 549.

(*m*) *Farmer* v. *Robinson*, 2 Camp. 339, n.; *Blagden* v. *Bradbear*, 12 V. 466; *Mason* v. *Armitage*, 13 V. 25; *Manser* v. *Back*, 6 Ha 443, *Smart* v. *Sandars*, 3 C. B. 380, *ante*, p. 209.

(*n*) See *Campanari* v. *Woodburn*, 15 C. B. 400; *Simpson* v. *Lamb*, 4 W. R. 328. But see and consider *Prickett* v. *Badger*, 1 C. B. N. S. 296; and *vide ante*, p. 215.

(*o*) *Maclean* v. *Dunn*, 4 Bing. 722; *Gosbell* v. *Archer*, 2 A. & E. 507, and see *De Bell* v. *Thompson*, 3 B. 469; *London and Birmingham R. Co.* v. *Winter*, Cr. & Ph. 57, *Wilson* v. *Tumman*, 6 Sc. N. R. 894; and *Blackwood* v. *Borrowes*, 4 D. & War. 441, 472.

(*p*) *Bigg* v. *Strong*, 3 S. & G. 592; 4 Jur. N. S. 983.

(*q*) *Foster* v. *Bates*, 12 M. & W. 226. This case forms an exception to the general rule that an administrator's title does not relate back; see 1 Wms. Exors. 637 *et seq.*

(*r*) *Re Empress Engineering Co.*, 16 Ch. D. 125, and see *Kelner* v. *Baxter*, L. R. 2 C. P. 174.

as agent for B., cannot be adopted by C. (s); nor when a contract is signed by one who professes to sign as agent, but who has no principal existing at the time, so that the contract would be inoperative unless binding on the person who signed it, can a stranger by a subsequent ratification relieve the professed agent from responsibility (t).

Clerk of agent cannot bind principal.

The clerk of an agent for sale has, it appears, no implied authority to bind the principal (u).

Land steward.

A land steward has no general authority to enter into contracts for leases for terms of years (v).

Under-hand bargain by agent.

Where one of several purchasers entered into a secret arrangement with the vendors, that if a sale were effected at a stipulated price, he was to receive a bonus out of the purchase-money, and he persuaded his co-purchasers that the vendors would not consent to any reduction of the price, it was, of course, held, that the transaction could not stand (x). And an agent cannot turn himself into a principal, and deal for himself with his real principal, unless he makes him aware of his altered position by the fullest disclosure (y).

Contracts by corporations.

A contract by a corporation must necessarily be made either by writing under its common seal, or by its officer or other agent authorized to make such contract; and the agent must make it in writing, if writing would be necessary were it the contract of an individual.

Agents of corporations, how appointed.

The agent must be appointed under the corporate seal in cases where the contract, if entered into by the corporation without the intervention of an agent, would have to be

(s) *Wilson* v. *Tumman*, 6 Man. & G. 236; 6 Sc. N. R. 894.

(t) *Kelner* v. *Baxter*, L. R. 2 C. P. 183.

(u) *Coles* v. *Trecothick*, 9 V. 234; *Blore* v. *Sutton*, 3 Mer. 237; and see *Bird* v. *Boulter*, 4 B. & Ad. 446; *Burnell* v. *Brown*, 1 J. & W. 168.

(v) *Collen* v. *Gardner*, 21 B. 540.

(x) *Beck* v. *Kantorowicz*, 3 K. & J. 230, and see *Dunne* v. *English*, 18 Eq 524.

(y) *Williamson* v. *Barbour*, 9 Ch. D. 529.

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under seal. The company may, by their conduct, adopt and ratify the act of an unauthorized agent, but the party contracting with such agent may repudiate at any time before ratification (z). In dealing with the agent of a public company it is not necessary to inquire whether the formalities prescribed by its regulations have been complied with in the appointment of the agent. The party contracting is, of course, bound to inquire whether the contract is within the objects for which the company was formed, and he has notice of the terms of the memorandum or other instrument creating it, and of the articles or deed regulating the rights and liabilities of the members *inter se*. But he is not necessarily affected by any irregularities which may have taken place in the internal management of the affairs of the company. For instance, he may assume, when he finds that a cheque is signed by directors, that they were duly appointed for the purpose of performing that function, and that they have properly performed it (a). So, when he finds a person acting, at all events upon the company's premises, as agent of a company which has power to appoint an agent, he is probably entitled to assume that such agent has been duly appointed (b).

Contracts under Public Health Act.

The provision in the Public Health Act, 1875 (c), that every contract made by an urban authority, whereof the value or amount exceeds £50, shall be in writing and sealed with the common seal, is imperative, and not merely directory (d).

(z) *Mayor of Kidderminster* v. *Hardwick*, L. R. 9 Ex. 24.

(a) *Mahony* v. *East Holyford Co.*, L. R. 7 H. L. 869, 894.

(b) *Smith* v. *Hull Glass Co.*, 11 C. B. 897. And see as to this principle in its general application, *Royal British Bank* v. *Turquand*, 6 E. & B. 327; *Agar* v. *Athenæum, &c. Society*, 3 C. B. N. S. 725; *Ex p. Eagle Co.*, 4 K. & J. 549.

(c) 38 & 39 Vict. c. 55, s. 174.

(d) *Hunt* v. *Wimbledon L. B.*, 4 C. P. D. 48; *Young* v. *Mayor of Leamington*, 8 Ap. Ca. 517. As to the meaning of the section, see *Eaton* v. *Basker*, 7 Q. B. D. 529, where it was held that to come within the Act the contract must be one with reference to which it was contemplated, at the time it was entered into, that the value or amount would exceed £50.

Company may ratify and adopt a contract not under seal.

There can, of course, be no doubt that a company may ratify under seal a previous contract not under seal, although the other party may withdraw before ratification (*dd*); and it is settled that they may, by their own conduct, as, *e.g.*, by an act of part performance, bind themselves to a contract, which an unauthorized agent may have entered into on their behalf (*e*); but an agreement by the promoters of the company, prior to its incorporation, is not binding on the company (*f*). A contract by the promoters for purchase, founded on the withdrawal of a landowner's opposition to the bill, has been enforced against the company; and, as a general rule, wherever the company have adopted, and had the benefit of a contract which is not *ultra vires*, and which, if entered into between ordinary individuals, would be valid, the contract may be enforced against them (*g*).

Companies Seals Act, 1864.

We may here refer to the Companies Seals Act, 1864 (*h*), under which a public company, formed under the Act of 1862, may have an official seal for use in foreign countries, and may employ a local agent to affix the same to any deed, contract, or other instrument to which the company is a party in such foreign country.

Contracts by trading corporations.

With reference to trading corporations, the result of the

(*dd*) *Mayor of Kidderminster* v. *Hardwick*, L. R. 9 Ex. 13.

(*e*) *Wilson* v. *West Hartlepool R. Co.*, 2 D. J. & S. 475; *Crook* v. *Corp. of Seaford*, 6 Ch. 551; but see remarks of Cotton, L. J., *Hunt* v. *Wimbledon L. B.*, 4 C. P. D. 62; *post*, p. 1139.

(*f*) *Kelner* v. *Baxter*, L. R. 2 C. P. 174; *Melhado* v. *Porto Allegre, &c. R. Co.*, L. R. 9 C. P. 503; *Re Empress Engineering Co.*, 16 Ch. D. 125.

(*g*) *Lowe* v. *L. & N. W. R. Co.*, 18 Q. B. 632; and see generally as to railway companies being bound by their adoption of contracts entered into in anticipation of their powers to purchase, or of their Acts of incorporation, and as to the validity of contracts for purchase founded on the withdrawal of parliamentary opposition, *Edwards* v. *Grand Junction R. Co.*, 1 M. & C. 650; *Stanley* v. *Chester, &c. R. Co.*, 3 M. & C. 773; *Preston* v. *Liverpool, &c. R. Co.*, 5 H. L. C. 605; *Wibb* v. *Direct London, &c. R. Co.*, 1 D. M. & G. 521; *Hawkes* v. *E. C. R. Co.*, 5 H. L. C. 331; *Stuart* v. *L. & N. W. R. Co.*, 1 D. M. & G. 721; *Gooday* v. *Colchester R. Co.*, 17 B. 132; *Shrewsbury and Birm. R. Co.* v. *L. & N. W. R. Co.*, 6 H. L. C. 113; *Lanc. and Carl. R. Co.* v. *L. & N. W. R. Co.*, 2 K. & J. 293; *Earl of Shrewsbury* v. *N. S. R. Co.*, 1 Eq. 593; see Sug. 75; 1 Lindley, 398.

(*h*) 27 & 28 Vict. c. 19.

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cases seems to be that whenever the contract is made for the purposes for which they were incorporated, it may be enforced, though not under seal (*i*).

Contracts of corporations generally.

As regards corporations generally, the principle appears to be that the necessity for a seal is dispensed with in cases of trivial importance, of great urgency, or regular occurrence (*k*).

Section 4.

(4.) *As to the deposit* (*l*).

As to the deposit.

Deposit is a part payment.

The deposit is not only a payment by anticipation of part of the purchase-money, but also an earnest of the performance of the contract (*m*); and the purchaser cannot elect to forfeit it and avoid the agreement (*n*).

Payment of.

Even the deposit should not be paid to a mere agent for sale, without express authority from the vendor. If the authority be for the agent to receive it at a particular time, or in a particular manner, of course it cannot be safely paid, except to, or by the direction of, the vendor, at any other time, or in any other manner (*o*); and the purchaser will not be liable for loss arising from his having followed any such special authority as to the mode of payment (*p*).

Vendor's solicitor receives it as his agent, and not as stakeholder.

If the vendor's solicitor receives the deposit he holds it as agent for the vendor, and not as stakeholder for both parties (*q*).

(*i*) *Henderson* v. *Australian Mail, &c. Co.*, 5 E. & B. 409; and see *Beverley* v. *Lincoln Gas Co.*, 6 A. & E. 829; and *South of Ireland Colliery Co.* v. *Waddle*, L. R. 4 C. P. 617, and the cases there cited.

(*k*) Per Ld. Blackburn in *Young* v. *Mayor of Leamington*, 8 Ap. Ca. at p. 525. This principle does not, of course, apply when the cases in which a seal is necessary are defined by statute: vide *ante*, p. 218, and s. 37 of the Companies Act, 1867.

(*l*) And see *ante*, sect. 2.

(*m*) *Howe* v. *Smith*, 27 Ch. D. 89; *Collins* v. *Stimson*, 11 Q. B. D. 143.

(*n*) *Crutchley* v. *Jerningham*, 2 Mer. 506; and see *Palmer* v. *Temple*, 9 A. & E. 520.

(*o*) See *Young* v. *Guy*, 8 B. 149.

(*p*) *Warwicke* v. *Noakes*, Pea. 67; *Hawkins* v. *Rutt*, *ibid.* 248; *Eyles* v. *Ellis*, 4 Bing. 112; Sug. 49.

(*q*) *Edgell* v. *Day*, L. R. 1 C. P. 80.

Not generally by settlement of accounts with agent;

The deposit cannot safely be paid by the purchaser, by being set off in account with the auctioneer or agent, except under the special circumstances of his being able to show the existence of a debt of equal amount due from the vendor to the auctioneer or agent, and that the latter was authorized by the vendor to retain the deposit on account of such debt (*r*);

nor by the purchaser's bill.

so, if, instead of making a cash payment, the purchaser give his acceptance, payment of the bill when due is no defence to an action by the vendor, if the bill never came into his possession (*s*). A cheque may be taken, in lieu of cash, for the deposit, even where the vendor is a mortgagee selling under his power of sale (*t*); but it should be capable of being immediately cashed, and should not include other moneys (*u*).

Cheque for, when void.

If a cheque be given for the deposit, an action on the cheque may be resisted upon any ground which would have enabled the purchaser to recover at Law the deposit if actually paid (*x*).

Investment of, when binding on purchaser or vendor.

If a purchaser become entitled to a return of his deposit, he can, in the absence of special agreement, claim the specific sum paid, with interest; and will not be prejudiced or advantaged by any fall or rise in any securities in which it may have been invested (*y*); unless such investment were made with his assent (*z*), (which will not be assumed from his making no reply to notice of the investment (*a*)), or (in the case of an action being brought for specific performance), under the authority of the Court, in which cases the investment

(*r*) *Barker* v. *Greenwood*, 2 Y. & C. 414; *Young* v. *White*, 7 B. 506; *Hanley* v. *Cassan*, 11 Jur. 1088; *Sweeting* v. *Pearce*, 9 C. B. N. S. 534; *Bridges* v. *Garrett*, L. R. 5 C. P. 451; and see *post*, p. 746 *et seq.*

(*s*) *Sykes* v. *Giles*, 5 M. & W. 645; *Williams* v. *Evans*, L. R. 1 Q. B. 352.

(*t*) *Farrer* v. *Lacy-Hartland*, 31 Ch. D. 42.

(*u*) *Bridges* v. *Garrett*, *suprà*.

(*x*) *Mills* v. *Oddy*, 6 C. & P. 728.

(*y*) *Doyley* v. *Powis*, 3 Br. C. C. 32; *Poole* v. *Rudd*, *ib.* 49; *Burroughes* v. *Browne*, 9 Ha. 609; and see *Powell* v. *Powell*, 19 Eq. 422.

(*z*) See *St. Paul* v. *Birmingham, &c. R. Co.*, 11 Ha. 305.

(*a*) See *Roberts* v. *Massey*, 13 V. 561; *Ackland* v. *Gaisford*, 2 Mad. 28.

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will be at his risk and for his benefit (*b*): and the same rules apply to an investment of the purchase-money by the purchaser, pending discussions as to title, &c.; and also apply conversely, for and against the vendor, in cases where, by the purchase being completed, he becomes entitled to the purchase-money (*c*).

When no enforceable contract, the deposit must be returned;

unless there be a provision for its forfeiture.

Where there is no contract, or no contract which can be enforced, the purchaser is entitled to have his deposit returned (*d*): but where there is a valid contract, which the purchaser refuses to perform, and which contains a clear stipulation that, in the event of breach, the deposit is to be forfeited, the vendor may retain it if paid, or may enforce any security (*e. g.*, an I O U) which he holds for it, and this without reference to the amount of damage actually sustained (*e*); and where there was no stipulation as to the forfeiture of the deposit, and the purchaser having accepted the title became bankrupt, and the trustee in bankruptcy disclaimed, the vendor was allowed to retain the deposit (*f*).

Forfeiture of, when relieved against.

Equity will, in general, relieve the purchaser against forfeiture of his deposit, if he be able and willing to give to the vendor the full benefit of the contract (*g*): its return, with interest, may be directed even in a suit for specific performance, where the bill is dismissed, if the vendor be plaintiff (*h*); so, also, in an action by the purchaser for rescission of the contract, on the ground of misrepresentation or the like (*i*).

(*b*) See *Poole* v. *Rudd*, 3 Br. C. C. 50.

(*c*) See *Burroughes* v. *Broune*, 9 Ha. 609.

(*d*) *Casson* v. *Roberts*, 31 B. 613; *Betts* v. *Burch*, 4 H. & N. 506; but see *Thomas* v. *Brown*, 1 Q. B. D. 714, 724, where, under the special circumstances, the purchaser was held to have precluded himself by his conduct from recovering the deposit.

(*e*) *Hinton* v. *Sparkes*, L. R. 3 C. P. 161; *Soper* v. *Arnold*, 35 Ch. D. 384.

(*f*) *Ex p. Barrell*, 10 Ch. 512; *Collins* v. *Stimson*, 11 Q. B. D. 142; and see *Howe* v. *Smith*, 27 Ch. D. 89.

(*g*) *Vernon* v. *Stephens*, 2 P. W. 66; *Moss* v. *Matthews*, 3 V. 279; Sug. 55; *Webb* v. *Kirby*, 7 D. M. & G. 376; *Want* v. *Stallibrass*, L. R. 8 Ex. 175.

(*h*) *Butler* v. *Lord Portarlington*, 1 D. & War. 65; *Graves* v. *Wright*, 2 *ib.* 79; *post*, p. 1255.

(*i*) *Torrance* v. *Bolton*, 8 Ch. 118.

But, according to the practice which has hitherto prevailed, the return of the deposit will not be ordered in an action for specific performance, where the purchaser is plaintiff and the action is dismissed (*k*); nor where the vendor is plaintiff, if the action is dismissed without any decision upon the question of title, but for *laches*, or on some other collateral ground (*l*). It is conceived, however, that since the Judicature Act, 1873, the technical rule which prevented a Court of Equity from directing the return of the deposit where the purchaser failed in his suit for specific performance, viz., that the granting of any relief was inconsistent with the dismissal of the bill, no longer operates, and that the Court has jurisdiction in any action, whether for the specific performance or the rescission of the contract, to direct a return of the deposit, where the purchaser would have been entitled to recover it at Law (*m*). If no title be shown the purchaser has a lien on the estate for the amount of the deposit (*n*), and also for his costs of suit (*o*); so, also, if the contract be rescinded for misrepresentation or the like (*p*).

Lien for.

If the purchaser die before obtaining a conveyance, intestate and without an heir, it seems probable that the vendor might retain both the estate and the deposit.

Death of purchaser.

As a general rule, if the deposit be lost through the insolvency of the auctioneer, the loss falls on the vendor (*q*); but fiduciary vendors, if they have used due diligence, will not be personally liable to their *cestuis que trust* (*r*).

Insolvency of auctioneer.

The Court has, on petition, ordered the return of a deposit paid by a purchaser under a fiat in Bankruptcy, which was subsequently superseded (*s*).

Return of in bankruptcy.

(*k*) *Bennet College* v. *Carey*, 3 Br. C. C. 390; see *Williams* v. *Edwards*, 2 Si. 78; *Gee* v. *Pearse*, 2 De G. & S. 325.

(*l*) *Southcomb* v. *Bishop of Exeter*, 6 Ha. 225, 228.

(*m*) See 36 & 37 V. c. 66, s. 24.

(*n*) *Wythes* v. *Lee*, 3 Dr. 396; see *post*, p. 506.

(*o*) *Middleton* v. *Magnay*, 2 H. & M. 233; *Hindley* v. *Emery*, 11 Jur. N. S. 874; *Turner* v. *Marriott*, 3 Eq. 744; Fry, Ch. vi.

(*p*) *Torrance* v. *Bolton*, 8 Ch. 118.

(*q*) *Ante*, sect. 2.

(*r*) *Edmonds* v. *Peake*, 7 B. 239.

(*s*) *Ex p. Fector*, Buck, 428.

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Lunatic purchaser.

Upon a purchase by a lunatic, the vendor cannot be required to refund the deposit, unless he contracted with notice of the lunacy (*t*).

Tenant for life not entitled to forfeited deposit.

Where trustees, pursuant to the usual power, contracted with the consent of the tenant for life, to sell, and a large deposit was paid to the latter, and then the purchaser failed to complete, it was held that the forfeited deposit did not belong to the tenant for life, but must be treated as purchase-money on an actual sale under the power (*u*).

Section 5.

(5.) *As to puffers and reserved biddings.*

As to puffers and reserved biddings.

The rule at Law as to employment of a puffer.

Prior to the 30 & 31 Vict. c. 48, it had become well settled at Law that, in the absence of a stipulation expressly reserving the vendor's right to bid, the employment of a single puffer would of itself vitiate the sale, even though it was not advertised as without reserve (*x*).

Puffers.

Rule as to Equity.

In Equity, however, it was the generally received doctrine that unless the property were expressly or impliedly offered for sale without reserve (*y*), the employment of a bidder to prevent its going at an undervalue was allowable (*z*); but the rule did not extend to authorize the employment of more bidders than one, even although they were limited to the same sum (*a*); nor even of a single bidder for the purpose of

(*t*) *Beaman* v. *M'Donnell*, 9 Ex. 309. As to *Frost* v. *Beaman*, 17 Jur. 369, *vide ante*, p. 7, n. (*h*).

(*u*) *Shrewsbury* v. *Shrewsbury*, 18 Jur. 397.

(*x*) See remarks of Lord Cranworth, in *Mortimer* v. *Bell*, 1 Ch. 10, who treats the rule as well established; *Warlow* v. *Harrison*, 6 Jur. N. S. 66; *Mainprice* v. *Westley*, 11 *ib.* 975; *Green* v. *Baverstock*, 10 *ib.* 1047; *Thornett* v. *Haines*, 15 M. & W. see pp. 371, 372; *Wheeler*. v. *Collier*, 1 M. & M. 123; *Crowder* v. *Austin*, 3 Bing. 368; *Rex* v. *Marsh*, 3 Y. & J. 331, where the puffer was employed by the Crown. See now *Gulliatt* v. *Gulliatt*, 9 Eq. 60, and *ante*, p. 126 *et seq.*

(*y*) *Meadows* v. *Tanner*, 5 Mad. 34; *Robinson* v. *Wall*, 2 Ph. 372; *Thornett* v. *Haines*, 15 M. & W. 367.

(*z*) *Woodward* v. *Miller*, 2 Coll. 279, where the earlier cases are cited; *Flint* v. *Woodin*, 9 Ha. 618.

(*a*) *Wheeler* v. *Collier*, 1 M. & M. 123, and see 15 M. & W. 372; and Sug. 10.

enhancing the price indefinitely (*b*); but, on a sale in lots, several bidders might, it is conceived, have been employed for different parts of the property, provided that no lot were protected by more than one bidder: nor was it material that the person employed to bid and the purchaser were the only bidders (*c*).

Purchasing by mistake, specific performance not enforced against.

Equity had, in fact, favoured the employment of a person to protect the property; for it had refused to enforce specific performance against a vendor, in the several cases of a person generally known as his agent having bid for the purchaser and been mistaken for a puffer (*d*), and of the person actually employed to bid for the vendor having neglected so to do (*e*): so, in a converse case, where, upon a sale of estates belonging to several vendors, the person employed to protect one estate, by mistake purchased another, the bill against him for specific performance was dismissed (*f*).

"Sale of Land by Auction Act, 1867."

The soundness of the general rule in Equity was however questioned by Lord Cranworth in the case of *Mortimer* v. *Bell* (*g*); and now by the 30 & 31 Vict. c. 48, the rule which must for the future obtain in Equity has been conformed to that which was already well established at Law. In every case the particulars or conditions of sale must state whether the land is sold without reserve, or subject to a reserved price, or whether the right to bid is reserved; and if it is stated that the sale is without reserve, or to that effect, it is made unlawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly a bidding from any such person (*h*). Where it is declared either in the particulars or conditions that the sale is subject to a right for the seller to bid, it is made lawful for the seller, or any *one* person on his behalf, to bid at such auction, in such manner

(*b*) *Smith* v. *Clarke*, 12 V. 483.

(*c*) *Oldfield* v. *Round*, 5 V. 508.

(*d*) *Twining* v. *Morrice*, 2 Br. C. C. 326.

(*e*) *Mason* v. *Armitage*, 13 V. 25.

(*f*) *Mulins* v. *Freeman*, 2 Ke. 25; *Swansland* v. *Dearsley*, 29 B. 430.

(*g*) 1 Ch. 10.

(*h*) As to the nature of the liability of the auctioneer in such a case, see *Heatley* v. *Newton*, 19 Ch. D. 327.

as he may think proper (*i*). Prior to this statute, the employment of a puffer where the sale was "without reserve," was as invalid in Equity as it was at Law; nor did it need the aid of the legislature to enable a vendor, by whom a right of bidding is reserved, to bid by himself or a single agent. By the 1st section it is provided, that whenever a sale by auction of *land* would be invalid at Law by reason of the employment of a puffer, the same shall be deemed invalid in Equity, as well as at Law; but the statute has failed to meet in express terms the precise point at issue in the practice at Law and in Equity, viz., whether, where the sale is not expressly stated to be "without reserve," and a right to bid is not expressly reserved by the vendor, or notified to the purchaser, the employment of a single bidder, to prevent a sale at an undervalue, is allowable. There can, however, be no doubt, that in such a case, the rule which is now well established at Law must for the future prevail in Equity.

(*i*) When the vendor does reserve such a right he must adhere strictly to the limits laid down in the conditions; *Parfitt* v. *Jepson*, 46 L. J. C. P. 529.

CHAPTER VI.

AS TO THE AGREEMENT.

1. *As to the general necessity for a written agreement.*
2. *The preparation of formal agreements.*
3. *What informal documents may constitute an agreement.*
4. *The signature.*
5. *The stamps.*
6. *As to illegal agreements.*

Section 1.

As to the general necessity for a written agreement.

Written agreement generally necessary under Statute of Frauds.

What sales not within the statute.

(1.) UNDER the Statute of Frauds (*a*), a written memorandum or note of agreement, signed by the party to be charged, or his agent, is generally (*b*) necessary, as the only receivable evidence (*c*) of any contract for the sale or purchase of lands, tenements, or hereditaments, or any estate or interest in or concerning them; whether such estate or interest be subsisting, or be proposed to be created *de novo:* and the Act extends to sales by auction (*d*), and in Bankruptcy (*e*); but not, it is said, to sales by the Court (*f*); nor to purchases under the order of the Court, if the owner of the estate make no opposition to the confirmation of the report approving of the purchase (*g*): nor apparently to agreements by deed (*h*),

(*a*) 29 Car. II. c. 3, see sect. 4; Sug. 121. Under this section the agent need not be appointed in writing.

(*b*) See an exception in cases of partnership, *Essex* v. *Essex*, 20 B. 442; but see *contra*, *Caddick* v. *Shadmore*, 2 D. & J. 52.

(*c*) For the Act does not avoid a parol contract, but merely, as a general rule, precludes its being given in evidence, see *Leroux* v. *Brown*, 12 C. B. 801; *Barkworth* v. *Young*, 4 Dr. 1.

(*d*) See *A.-G.* v. *Day*, 1 V. sen. 218, and *Blagden* v. *Bradbear*, 12 V. 472; *Higginson* v. *Clowes*, 15 V. 521.

(*e*) *Ex p. Cutts*, 3 Dea. 267.

(*f*) See 1 V. sen. 218; *Lord* v. *Lord*, 1 Si. 503; but the purchaser is always required to sign.

(*g*) See 1 V. sen. 218; 12 V. 472.

(*h*) *Cherry* v. *Heming*, 4 Ex. 631, 636.

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sealing and delivery being in such cases sufficient without signature.

Parol executory agreement for lease,

And although an actual demise by parol for any term not exceeding three years, at a rent not less than two-thirds of the improved value, is valid under the 2nd section of the statute (*i*), an executory agreement for such a demise is void unless in writing. So a parol agreement by a lessee for an assignment of the residue of his term (being less than three years) is void; and cannot, it would seem, operate as an underlease (*k*).

or for assignment of terms less than three years, void.

Operation of statute.

The statute "is a weapon of defence, not of offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties" (*l*).

An instrument void as a lease may be supported as an agreement.

A lease for a term exceeding three years must, under the 1st section, be in writing, and now, under the 8 & 9 Vict. c. 106, s. 3, by *deed;* but in Equity, an instrument containing present words of demise, but void as a lease for want of sealing and delivery, will be supported as an agreement (*m*). In one case, a document, not under seal, and therefore void as a lease, has been held at Law to be also void as an agreement (*n*); but the soundness of this decision has been questioned; and in a later case, where by the same instrument, not under seal, A. agreed to let and B. to take certain premises from the date of the agreement until Lady-day then next, and thenceforward for three years, but as to the latter term the consent of the landlord was to be obtained, and a lease was to be executed, it was held that there was a lease

(*i*) See *Crosby* v. *Wadsworth*, 6 East 602, 610, *Lord Bolton* v. *Tomlin*, 5 A. & E. 857, 864.

(*k*) *Barrett* v. *Rolph*, 14 M. & W. 348.

(*l*) Per Lord Selborne in *Hussey* v. *Horne-Payne*, 4 App. Ca. 311, 323, following *Jones* v. *Berridge*, 8 Ch. 360.

(*m*) *Parker* v. *Taswell*, 2 D. & J. 559; *Coven* v. *Phillips*, 33 B. 18.

(*n*) *Stratton* v. *Pettit*, 16 C. B. 420; *Drury* v. *Macnamara*, 5 E. & B. 612; but see *Tress* v. *Savage*, 4 E. & B. 36.

for the former period, and an agreement for a lease as to the latter (*o*); and the variance between the legal and the equitable rule has been greatly modified by recent decisions (*p*). Where by an agreement, void as a lease, the defendant undertook "to hold the land at the rent and subject to the conditions to be contained" in the lease, he was held liable for the rent, although he had never entered or taken possession (*q*); so, where a document, void as a lease, contained an undertaking to grant a lease, it was held that it was good as an agreement, and that an action would lie on the contract (*r*). And conversely *de præsenti* words of agreement to let, though void under the statute as an agreement, may create a good demise for a term of less than three years (*s*).

Effect of Judicature Act.

It has been said in a recent case (*t*), that the old rule, that a tenant holding under an agreement for a lease is merely a yearly tenant, has been abrogated by the Judicature Act, 1873, which enacts that in case of conflict between the rules of Law and Equity with reference to the same matter, the rules of Equity are to prevail, and that such a tenant is therefore in all respects in the same position as if the lease had been executed. But it may be doubted whether this *dictum* does not go too far, since it practically amounts to a repeal of the Statute of Frauds on this point.

Whether parol licence is valid.

The first section of the Statute of Frauds, which renders a writing necessary for the creation of "all leases, estates, interests of freehold, or terms of years, or any uncertain interest, of, in, or out of any lands," &c., has been held not to extend to a licence; *e.g.*, a licence to A., in consideration of a yearly payment, to stack coals on a piece of

(*o*) *Rollason* v. *Leon*, 7 H. & N. 73; and see comments on *Stratton* v. *Pettit*.

(*p*) See especially *Tidey* v. *Mollett*, 16 C. B. N. S. 298; *Stranks* v. *St. John*, L. R. 2 C. P. 376; *Martin* v. *Smith*, L. R. 9 Ex. 50.

(*q*) *Adams* v. *Hagger*, 4 Q. B. D. 480.

(*r*) *Bond* v. *Rosling*, 1 B. & S. 371.

(*s*) See *Hand* v. *Hall*, 2 Ex. D. 355.

(*t*) *Walsh* v. *Lonsdale*, 21 Ch. D. 9, 14; but see *Coatsworth* v. *Johnson*, 55 L. J. Q. B. 220.

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ground for seven years, with the sole use of the land so employed (*u*); but although this decision has been often followed (*x*), its authority, so far as it may tend to show that an irrevocable interest may be thus created, seems to be destroyed by subsequent cases, which decide that an easement cannot, at least as against the inheritance (*y*), be granted without deed (*z*): it is also conceived that a parol executory agreement for such a licence would probably be invalid; the words, "in or concerning," in the 4th section, being, apparently, more comprehensive than the words, "of, in, or out of," in the 1st section.

Semble, not.

Licence revocable.

A mere licence is revocable by the grantor at any time (*a*); but reasonable notice of the revocation should be given (*b*). Where a memorandum was endorsed on a lease, that the lessee should have the exclusive right of sporting over the demised and adjoining properties, and there was evidence that the enjoyment of this privilege was an essential part of the consideration for taking the lease, the landlord was restrained from interfering with the right, until he had executed a proper legal grant (*c*).

Any agreement substantially for a sale, is within the statute.

Any arrangement which is substantially, although not professedly, a sale of an interest in land, is within the 4th section, and requires a written contract: *e.g.*, an agreement by a person possessed of a term for years, to give up possession to another, and allow him to become tenant for the remainder

(*u*) *Wood* v. *Lake*, Say. 3. See as to the effect of licences, *Doe* v. *Wood*, 2 B. & Ald. 724.

(*x*) Sug. 123, 124; see cases cited in *Wood* v. *Leadbitter*, 13 M. & W. 840.

(*y*) See *Perry* v. *Fitzhowe*, 8 Q. B. 778.

(*z*) See 1 Jarm. Conv. 289, and cases there cited; and, in particular, *Cocker* v. *Cooper*, 1 C. M. & R. 418; *Bird* v. *Higginson*, 4 N. & M. 505; and see *Wood* v. *Leadbitter*, *suprà*; *Perry* v. *Fitzhowe*, *suprà*; *Adams* v. *Andrews*, 15 Q. B. 284; *Ruffey* v. *Henderson*, 21 L. J. Q. B. 49; and see the subject fully discussed in the recent case of *McManus* v. *Cooke*, 35 Ch. D. 681.

(*a*) *Wood* v. *Leadbitter*, *suprà*; which see also as to the distinction between a mere licence and a grant with a licence annexed.

(*b*) *Cornish* v. *Stubbs*, L. R. 5 C. P. 334; *Mellor* v. *Watkins*, L. R. 9 Q. B. 400.

(*c*) *Frogley* v. *Earl of Lovelace*, John. 333.

of the term, in consideration of his paying in part for certain repairs (*d*); or an agreement by the termor to quit possession on a certain day, and pay all outgoings up to that time, in consideration of a sum of money to be paid to him by a party who has agreed with the landlord for a lease of the premises on the termination of the subsisting term (*e*); or an agreement by a termor, under similar circumstances, that he will part with the land, and that the intended lessee shall take it (*e*); or an agreement by a person who has no interest in the property, to procure a sale and conveyance of it to a person who wants to buy it (*f*).

So, a parol agreement by A. with an occupying tenant to pay him £100, upon the tenant surrendering his lease, and procuring the landlord to accept A. as tenant, is void (*g*); nor can the tenant sue for the consideration, upon the contract, although he have performed his part of it; but he may sue upon an account stated, if, after such performance, A. have admitted that he is indebted to him in the amount of the consideration (*g*). So, where there was a parol agreement for the transfer of a tenancy, and the transferee promised to pay the arrears of rent, it was held that the transferor could not recover damages for breach of the promise (*h*).

Agreement merely collateral, *e.g.*, by mortgagor to pay costs.

But an agreement merely collateral to a proposed dealing with land does not seem to be within the Act: *e.g.*, an agreement by an intending mortgagor to pay to an intending mortgagee his costs of investigating the title, should such

(*d*) *Buttemere* v. *Hayes*, 5 M. & W. 456.

(*e*) *Smith* v. *Tombs*, 3 Jur. 72.

(*f*) *Horsey* v. *Graham*, L. R. 5 C. P. 9. An agreement to charge land falls within the section, *Whitmore* v. *Farley*, 43 L. T. 192, 196; or rent, *Ex p. Hall*, 10 Ch. D. 615, 620; so does an agreement to deposit deeds relating to land, *Ex p. Coombe*, 4 Mad. 249. *Quære*, whether the actual deposit is part performance sufficient to take the case out of the statute; see *Ex p. Broderick*, 18 Q. B. D. 766.

(*g*) *Cocking* v. *Ward*, 1 C. B. 858; *Kelly* v. *Webster*, 12 C. B. 283; *Smart* v. *Harding*, 15 C. B. 652. But see *Angell* v. *Duke*, L. R. 10 Q. B. 174, and *Ronayne* v. *Sherrard*, I. R. 11 C. L. 146.

(*h*) *Hodgson* v. *Johnson*, E. B. & E. 685.

title prove bad (*i*): so, where the agreement, so far as it relates to land, has been executed, it has been held that an action will lie for the non-performance of a special promise to be performed after execution, as, *e. g.*, an undertaking to repay part of the price on a certain event (*k*). But the old authorities, to the effect that the statute does not apply to executed contracts, though executed on one side only, must now be taken to be overruled (*l*).

Void agreement may as a licence excuse trespass.

An agreement void under the 4th section may, until countermanded, operate as a licence, so as to excuse what would otherwise be trespass (*m*).

Written transfer of parol agreement.

And the transfer in writing of a parol, and therefore void, agreement for purchase of an estate, will be a good consideration as between transferor and transferee, if the latter actually obtain a conveyance from the vendor (*n*): so, if an agent for purchase enter into a parol agreement, and pay the purchase-money, and procure a conveyance, he can sue his principal for the amount (*o*).

(*i*) *Jeakes* v. *White*, 6 Ex. 873. A building contract is not, as such, within the statute, *Sanderson* v. *Graves*, L. R 10 Ex. 234; *Mann* v. *Nunn*, 43 L. J. C. P. 241; nor is an agreement to furnish, *Angell* v. *Duke*, L. R. 10 Q. B. 174; nor an agreement to kill down game, *Morgan* v. *Griffith*, L. R. 6 Ex. 70; *Erskine* v. *Adeane*, 8 Ch. 756.

(*k*) *Green* v. *Saddington*, 7 E. & B. 503; *Cocking* v. *Ward*, 1 C. B. 858; and see *Griffith* v. *Young*, 12 Ea. 513. As to the doctrine of part performance, which is often inaccurately said to take out of the operation of the statute a case which would otherwise be within it, see the notes to *Lester* v. *Foxcroft*, 1 Wh. & T. L. C. When an overt act is done by one party which is only referable to a contract with another party, an equity may be raised subsequent in date to, although arising out of, the contract, upon which, as distinguished from the contract itself, the other party is charged. In such a case the Court inquires what the terms of the verbal contract were, not for the purpose of charging that party, but of ascertaining the nature of the equity upon which he is to be charged; see the recent cases of *Maddison* v. *Alderson*, 8 Ap. Ca. 467; and *Britain* v. *Rossiter*, 11 Q. B. D. 123; see also *Phillips* v. *Alderton*, 24 W. R. 8, and *post*, pp. 1134 *et seq.*

(*l*) *Sanderson* v. *Graves*, L. R. 10 Ex. 234.

(*m*) *Carrington* v. *Roots*, 2 M. & W. 248; see *Crosby* v. *Wadsworth*, 6 Ea. 602; *Winter* v. *Brockwell*, 8 Ea. 308; and see *Scott* v. *Wedlake*, 8 Q. B. 778; and *Ruffey* v. *Henderson*, 21 L. J. Q. B. 49.

(*n*) *Seaman* v. *Price*, Ry. & M. 195.

(*o*) *Pawle* v. *Gunn*, 4 Bing. N. C. 445.

Mining but not railway shares within the 4th sect.

The words in the 4th section relating to "any estate or interest" in lands have been held to extend to shares in a mining company (*p*), unless conducted on the cost-book principle (*q*); and to Westminster Improvement Bonds (*r*); but not to shares in a railway company; at least if the Act of Incorporation makes them personal estate (*s*); nor to shares in a water company (*t*); so, too, they extend to a partnership in land (*u*).

Sale of growing crops.

Questions frequently arise as to the necessity for a written agreement for the sale of growing crops; the law upon the subject can hardly be considered as settled (*x*); but the following appears to be the general result of the authorities:—

The point to be determined in such cases is, whether the interest contracted for is an interest in land within the meaning of the 4th section of the Statute of Frands;—in which case a written agreement is necessary;—or whether the contract is merely for the sale of chattels; in which case, however, unless the price be under £10, there must, under the 17th section, be a written agreement or memorandum, signed by the party or by his agent, or part payment of the price, or part acceptance of the goods (*y*): but a bill of lading, which is the symbol of the property, may be so dealt with as to constitute an acceptance within the 17th section (*z*); thus, where goods remained in the possession of the seller, but the buyer, to whom an invoice had been sent, dealt with them as if warehoused on his behalf, it was held that there

(*p*) *Boyce* v. *Greene*, Bat. 608; see comments on this case in Lindley, 674.

(*q*) *Watson* v. *Spratley*, 10 Ex. 222; see, too, *Powell* v. *Jessopp*, 18 C. B. 336; *Walker* v. *Bartlett*, *ib.* 845; and *Hayter* v. *Tucker*, 4 K. & J. 243.

(*r*) *Toppin* v. *Lomas*, 16 C. B. 145.

(*s*) *Bradley* v. *Holdsworth*, 3 M. & W. 422; *Duncuft* v. *Albrecht*, 12 Si. 199.

(*t*) *Bligh* v. *Brent*, 2 Y. & C. 268.

(*u*) *Caddick* v. *Skidmore*, 2 D. & J. 52; but see Lindley, 89.

(*x*) Sug. 124—126.

(*y*) *Smith* v. *Surman*, 9 B. & C. 569. As to what constitutes acceptance within this section, see Benjamin, bk. i. c. 4.

(*z*) *Meredith* v. *Meigh*, 2 E. & B. 364; *Currie* v. *Anderson*, 2 E. & E. 592.

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was a constructive acceptance which satisfied the statute (*a*): the mere agreement, however, does not, until the time for its completion has arrived, transfer the property in chattels (*b*).

Cases within the 4th sect.

An agreement for sale of the exclusive right to the vesture of land, or for sale of crops which would not go as emblements to the executor (*c*), as, *e. g.*, mowing grass (*d*), standing underwood (*e*), poles or timber, is within the 4th section; nor, in the case of grass, does it appear to be material whether it is to be mowed or fed off by the purchaser; that is, if, in the latter case, he is to have the exclusive right to it (*f*); so, also, an agreement for the sale of growing fruits (*e. g.*, pears) (*g*), is within the 4th section (*h*).

Game.

A right to kill and take away game is a profit *à prendre*, and within the statute (*i*).

Cases not within the 4th sect.

But if the agreement be for sale of the crop after the seller shall have reduced it to a chattel by severance from the freehold, as where standing timber is to be felled by the vendor, the 4th section does not seem to apply (*k*); and the same distinction would, it is conceived, exist in agreements for the

(*a*) *Castle* v. *Sworder*, 6 H. & N. 828.

(*b*) *Lanyon* v. *Toogood*, 13 M. & W. 27; *Sleddon* v. *Cruikshank*, 16 M. & W. 71. See as to acceptance, *Saunders* v. *Topp*, 4 Ex. 390, and cases cited; *Morton* v. *Tibbett*, 15 Q. B. 428; *Holmes* v. *Hoskins*, 9 Ex. 753.

(*c*) See judgment in *Evans* v. *Roberts*, 5 B. & C. 829: and as to emblements, *Graves* v. *Weld*, 5 B. & Ad. 105; Sug. 125.

(*d*) *Crosby* v. *Wadsworth*, 6 Ea. 602; *Carrington* v. *Roots*, 2 M. & W. 248.

(*e*) *Scorell* v. *Boxall*, 1 Y. & J. 396.

(*f*) See *Jones* v. *Flint*, 10 A. & E. 760.

(*g*) *Rodwell* v. *Phillips*, 9 M. & W. 501; *sed qu.* Whether so, if the crop be mature at the time of sale?

(*h*) Growing crops were not within the Bills of Sale Act, 1854; *Brantom* v. *Griffits*, 2 C. P. D. 212; *Ex p. Payne*, 11 Ch. D. 539. But when severed they became personal chattels; *Ex p. Nat. Merc. Bank*, 16 Ch. D. 104. Now, by sect. 4 of the Act of 1878, growing crops, "when separately assigned or charged," are personal chattels, and a bill of sale of them requires registration. As to what is a separate assignment, see sect. 7.

(*i*) *Webber* v. *Lee*, 9 Q. B. D. 315.

(*k*) *Smith* v. *Surman*, 9 B. & C. 551; and see *Lord Falmouth* v. *Thomas*, 1 C. & M. 105; and *Marshall* v. *Green*, 1 C. P. D. 35.

Emblements.

sale of gravel (*l*), stone, or other minerals: nor does the 4th section seem to affect sales of crops which would go as emblements (*m*); such as hops (*n*), wheat, potatoes, turnips (*o*), &c.: nor does it appear material in such cases whether the crop at the time of sale is mature or otherwise, or whether it is to be removed by the buyer or seller, or to be paid for by the quantity or by the acre (*p*); and even in the case of grass, if the vendor retain possession of the land, and the right of turning on his own cattle, and the purchaser have no right of severance, but only to feed it off along with the vendor, the agreement is merely for agistment, and is not within the 4th section (*q*); nor does this section apply to an agreement in respect of damage to the surface (*r*): but in none of these cases is it prudent to dispense with a written contract.

Parol agreement good between tenants; but not as between lessor and incoming tenant.

And a parol agreement, for the sale of growing crops, which would otherwise be void under the 4th section, may be good as between outgoing and incoming tenants (*s*): but a sale of the growing crops by the lessor to the incoming tenant, seems to require a written contract under the 4th section (*t*).

Vendor's remedy if purchaser take the crop.

And although an agreement be void under the 4th section, the seller (unless perhaps the parties be landlord and tenant) can recover the value of the crop if it be taken or received by the purchaser (*u*); but he cannot recover on the terms of the agreement, but only on a *quantum valebat* (*x*).

(*l*) See *Coulton* v. *Ambler*, 13 M. & W. 403.

(*m*) Sug. 125; but see *Waddington* v. *Bristow*, 2 B. & P. 452.

(*n*) *Evans* v. *Roberts*, 5 B. & C. 829; see judgment; and Sug. 126.

(*o*) *Dunne* v. *Ferguson*, Hay. 541.

(*p*) *Parker* v. *Staniland*, 11 Ea. 362; *Warwick* v. *Bruce*, 2 M. & S. 205; *Evans* v. *Roberts*, 5 B. & C. 829; *Hallen* v. *Runder*, 1 C. M. & R. 266, 275; *Sainsbury* v. *Matthews*, 4 M. & W. 343; *Dunne* v. *Ferguson*, Hay. 541.

(*q*) *Jones* v. *Flint*, 10 A. & E. 760.

(*r*) *Griffiths* v. *Jenkins*, 10 Jur. N. S. 207.

(*s*) *Mayfield* v. *Wadsley*, 3 B. & C. 357; and see Sug. 125.

(*t*) *Lord Falmouth* v. *Thomas*, 1 C. & M. 89.

(*u*) *Teall* v. *Auty*, 4 Mo. 542; *Knowles* v. *Michel*, 13 Ea. 249.

(*x*) *Lord Falmouth* v. *Thomas*, 1 C. & M. 109.

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An agreement to take furnished lodgings not within the 4th sect.

An agreement to take furnished lodgings in a boarding-house is not a contract for an interest in land within the 4th section (*y*).

Parol agreement for sale of tenant's fixtures, whether sufficient.

A sale of tenant's fixtures by the tenant to the landlord, has been held not to be within the 4th section, although they be sold while attached to the freehold (*z*): the so-called sale of the fixtures being merely a renunciation of the right to remove them.

Agreement for increase, or abatement, of rent.

An agreement by a tenant to pay an increased sum by way of rent, in consideration of improvements to be made by the landlord, has been held not to be within the Act; and therefore to be valid although by parol (*a*): but a different rule has been laid down as respects an agreement for abatement of rent (*b*). In the one case the agreement is, in effect, to pay the landlord, by instalments, for services rendered; in the other, the agreement is for a *release* of part of the rent.

Void agreement for (*inter alia*) the sale of land, where void *in toto*.

If an agreement relating to the sale of land be void under the 4th section, it will also be void as respects any other matters, which are either inseparably mixed up with, or are dependent upon, the principal agreement (*c*); *e.g.*, where a tenant agreed to rent a furnished house, and the landlord was to supply additional furniture after the tenant had taken possession, it was held, that the want of a written contract was a bar to an action for non-delivery of the furniture (*d*); so, upon a parol agreement to let a house,

(*y*) *Wright* v. *Stavart*, 2 E. & E. 721; apparently because the occupation is not exclusive; see *Inman* v. *Stamp*, 1 Stark. 12; *Edge* v. *Strafford*, 1 Tyr. 295; 1 C. & J. 391.

(*z*) *Hallen* v. *Runder*, 1 C. M. & R. 266, 276; and cf. *Lee* v. *Risdon*, 7 Taun. 188; and *Lee* v. *Gaskell*, 1 Q. B. D. 700; and see Amos & F. 328 *et seq.*

(*a*) *Donellan* v. *Read*, 3 B. & A. 899, 904; *Hoby* v. *Roebuck*, 7 Taun. 157; *Mann* v. *Nunn*, 43 L. J. C. P. 241.

(*b*) *O'Connor* v. *Spaight*, 1 Sch. & L. 306.

(*c*) *Cooke* v. *Tombs*, 2 Anst. 420; see *Mayfield* v. *Wadsley*, 3 B. & C. 357, 361; and two next notes.

(*d*) *Mechelen* v. *Wallace*, 7 A. & E. 49; but cf. *Mann* v. *Nunn*, 43 L. J. C. P. 241.

and to make certain repairs, which the tenant was to pay for, it was held that the landlord could not sue him for the cost of such repairs (*e*): but this rule does not apply where the contracts, though in a sense connected with each other, are in fact independent and separable (*f*).

Variation of terms makes new contract.

A variation by parol of the terms of a written contract is, in general, a new contract, and the statute may be available as a defence (*g*).

Section 2.

(2.) *As to the preparation of formal agreements.*

As to the preparation of formal agreements.

As to formal agreements.

Upon formal agreements for sale, few questions arise distinguishable from those which have been already considered with reference to the particulars and conditions.

Agreement on sale by auction, refers to particulars, &c.

Upon a sale by auction, the agreement, of course, refers to, and is generally written or printed upon a copy of, the particulars and conditions.

It seems to be desirable for both parties when several lots are bought by the same purchaser to have a separate contract for each lot; instead, as not unfrequently happens, of all the lots being included in a single contract at a lump sum.

What to be comprised in agreement, on sale by private contract.

Upon a sale by private contract, the agreement (which is usually prepared by the vendor), as a general rule, comprises whatever stipulations and other matter would, had the sale been by auction, have been comprised within the particulars and conditions, except such matter as exclusively applies to an auction. When it is probable that special stipulations, as to title, &c., will be necessary, the agreement should be

(*e*) *Vaughan* v. *Hancock*, 3 C. B. 766; and see *Lord Falmouth* v. *Thomas*, 1 C. & M. 89.

(*f*) *Green* v. *Saddington*, 7 E. & B. 503; *Cocking* v. *Ward*, 1 C. B. 858; but see and distinguish *Angell* v. *Duke*, L. R. 10 Q. B. 174; and cf. *Ronayne* v. *Sherrard*, 11 I. R. C. L. 146.

(*g*) *Sanderson* v. *Graves*, L. R. 10 Ex. 234.

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prepared in blank before the estate is offered for sale. A purchaser, on buying a reversion, ought to procure a stipulation to be inserted in the contract, that the vendor shall pay the succession duty and indemnify him therefrom (*h*); or, shall at once compound for and pay it.

What supplied by Vendor and Purchaser Act, 1874, and Conv. Act, 1881.

The rules prescribed by the Vendor and Purchaser Act, 1874 (*i*), and the Conveyancing Act, 1881 (*k*), and which, subject to any stipulation to the contrary in the contract, now regulate the obligations and rights of vendor and purchaser, apply equally whether the land (*l*) is sold by public auction or by private treaty.

Matters to be provided for, in agreement for sale to public companies, &c.

In preparing agreements for the sale of land to promoters of public undertakings, care should be taken to state whether the purchase-money is to be in lieu of those accommodation works which the promoters are *primâ facie* bound to make and maintain for the owners of adjoining land; and whether the ordinary or statutory rule as to the expenses of the purchaser is to operate (*m*): the agreement for sale to a railway or waterworks company should, if such be the intention, expressly state that the mines and minerals are included in the purchase (*n*).

Pre-emption clauses.

When a lease or other document contains a clause giving the lessee or any other person a right of pre-emption, the same or like stipulations should be inserted for the protection of the future vendor in respect to title, expenses, and other matters, as would be inserted in an absolute contract for sale and purchase. The precaution is one which is frequently omitted in preparing leases which contain pre-emption clauses.

(*h*) See *Cooper* v. *Tremby*, 28 Beav. 194.

(*i*) 37 & 38 V. c. 78, s. 2.

(*k*) Sect. 3.

(*l*) The former enactment does not seem to extend to a contract for the sale of an incorporeal hereditament; the latter does, sect. 2 (2).

(*m*) See Frend & Ware, 146.

(*n*) See 8 & 9 V. c. 20, s. 77, and 10 & 11 V. c. 17, s. 18. This proposition applies also to the company's notice to treat; *Loosemore* v. *Tiverton, &c. R. Co.*, 22 Ch. D. 25; 9 Ap. Ca. 480. As to what is included under the term minerals, see *ante*, p. 130.

(3.) *As to what informal documents may constitute an agreement.*

As to what informal documents may constitute an agreement.

Informal agreements give rise to questions of greater difficulty.

Informal agreements.

What may be a sufficient agreement within the statute.

We may lay down as general, although not universal, rules, 1st, that any writing signed by the party to be charged, or his agent, and which, either expressly or by reference to other writings, determines the parties to and subject-matter of a contract, and fixes, or provides the compulsory means of fixing, all its terms, is a sufficient agreement within the statute; and, 2ndly, that no writing is a sufficient agreement which fails in any of the above-mentioned particulars.

Letters.

Thus letters are constantly held to constitute a binding contract, and often where such a result is a surprise upon the writers (*o*); and a letter addressed by either a vendor, or, it would appear, a purchaser, to a third person, with directions incidental to the carrying out of the agreement—*e. g.*, the delivery of title deeds, or preparation of the conveyance—may suffice to bind the writer (*p*): and a letter, which contained an admission of the bargain, and of all its essential terms, has been held a sufficient memorandum to satisfy the statute, notwithstanding that the writer at the same time repudiated his liability (*q*): so, also, letters written with

(*o*) *Kennedy* v. *Lee*, 3 Mer. 441. "The same construction must be put upon a letter that would be applied to the case of a more formal instrument; the only difference being, that a letter, or correspondence, is generally more loose and inaccurate in respect of terms, and creates a greater difficulty in arriving at a precise conclusion." Per Lord Eldon, *ibid.* 451; see also *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Thomas* v. *Blackman*, 1 Coll. 301; and *Greene* v. *Cramer*, 2 Con. & L. 54, 63; and see *Fitzmaurice* v. *Bayley*, 6 E. & B. 868; 8 *ib.* 664; 9 H. L. C. 78; *Rossiter* v. *Miller*, 5 Ch. D. 658; 3 Ap. Ca. 1124; *May* v. *Thomson*, 20 Ch. D. 716.

(*p*) *Walford* v. *Beazely*, 3 Atk. 503; *Cooke* v. *Tombs*, 2 Anst. 420, 426; *Owen* v. *Thomas*, 3 M. & K. 353; *Rose* v. *Cunynghame*, 11 V. 550; Sug. 139; *Goodwin* v. *Fielding*, 4 D. M. & G. 90.

(*q*) *Bailey* v. *Sweeting*, 9 C. B. N. S. 843; *Gibson* v. *Holland*, L. R. 1 C. P. 1, and cases there cited; Fry, 243.

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Receipt for purchase-money.

reference to a pending dispute as to whether a parol agreement has been duly performed, and embodying the terms of that agreement (*r*): so, the vendor's receipt for the purchase-money or deposit, or a similar receipt signed by the auctioneer, or the entry of sale made by him in his books (*s*), or a bond of reference to a surveyor to settle the price to be paid by the purchaser, would, it appears, be sufficient (*t*): and in one case, where there was a parol agreement in contemplation of marriage, and after the marriage an affidavit in another matter was sworn and filed by the person sought to be charged, it was held that there was a sufficient memorandum to satisfy the statute (*u*): but where there was a verbal contract by W. with A. for the sale of the Lion Inn, for £950, and on the following day W.'s solicitor wrote to A.'s solicitor:—"W. has been with us to-day, and stated that he had arranged with your client A. for the sale to the latter of the Lion Inn for £950. We, therefore, send herewith draft contract for your perusal and approval";—it was held that this letter was not a sufficient note or memorandum (*x*).

As to contracts of pre-emption.

Where a will gave to A. an option of purchase within a limited period, a mere verbal declaration to the trustees that he intended to take the property, the purchase-money remaining unpaid and the conveyance unexecuted, was, of course, held insufficient (*y*). Such an option can, doubtless, be enforced (*z*), but the conditions imposed on its exercise are always strictly construed; and all precedent conditions must be fulfilled by the purchaser before any contract

Strictly construed.

(*r*) *Fyson* v. *Kitton*, 3 C. L. R. 705; and see *Studds* v. *Watson*, 28 Ch. D. 305.

(*s*) *Coles* v. *Trecothick*, 9 V. 234; *Blagden* v. *Bradbear*, 12 V. 466; *Gosbell* v. *Archer*, 2 A. & E. 500; *Emmerson* v. *Heelis*, 2 Taun. 38, 48; Sug. 134, 139.

(*t*) Per Lord Rosslyn, *Cooth* v. *Jackson*, 6 V. 17.

(*u*) *Barkworth* v. *Young*, 4 Dr. 1; but see the form of the affidavit, and *quære*. As to an answer in Chancery being a sufficient memorandum, see *Ridgway* v. *Wharton*, 3 D. M. & G. 677, and *vide post*, p. 249.

(*x*) *Smith* v. *Webster*, 3 Ch. D. 49.

(*y*) *Dawson* v. *Dawson*, 8 Si. 346.

(*z*) *Lord Radnor* v. *Shafto*, 11 V. 448, 454; *Cookson* v. *Cookson*, 8 Si. 529.

binding the vendor can arise (*a*). Thus where the donee of a right of pre-emption on payment of the price within a limited time, duly signified his intention of purchasing and applied for an abstract, but the prescribed period expired without the purchase-money being paid or any further step taken, the right of pre-emption was lost (*b*). Where a lease contained a covenant by the lessor, at the option of the lessee, his executors, administrators, and assigns, to sell the fee simple at a fixed price, and the lessee died intestate without having exercised the option, it was held that the option to purchase was attached to the lease and thus formed part of the lessee's personal property and passed to his administrator (*c*). But where there was merely a contract for a lease with a right of pre-emption, it was held that the right to purchase was independent of the right to a lease, and was not avoided by the forfeiture of the latter (*d*). Whether an option of purchase, "at all times thereafter," when created by agreement, can be exercised after the death of the owner of the property, was in one case doubted (*e*); but unless its exercise be restrained by the context to a period allowed by the rule against perpetuities, it is now settled that the power is bad, as transgressing the rule (*f*). Where there was an agreement to let a house for three years, and at the tenant's request to grant a lease from the expiration of the tenancy, the tenant, who had continued in occupation, was held entitled four years after the expiration of the three years' tenancy to

Right of option "at all times thereafter."

(*a*) *Weston* v. *Collins*, 11 Jur. N. S. 190.

(*b*) *Brooke* v. *Garrod*, 2 D. & J. 62; *Alderson* v. *White*, 2 D. & J. 97. See *Crawford* v. *Toogood*, 13 Ch. D. 153.

(*c*) *Re Adams and Kensington Vestry*, 27 Ch. D. 394.

(*d*) *Green* v. *Low*, 22 B. 625; but see the terms of the contract. See as to what is a sufficient exercise of the option, *Powell* v. *Lovegrove*, 8 D. M. & G. 357; *Austin* v. *Tawney*, 2 Ch. 143. As to the benefit of the option being lost by delay, see *Mills* v. *Haywood*, 6 Ch. D. 196.

(*e*) *Stocker* v. *Dean*, 16 B. 161.

(*f*) *L. & S. W. R. Co.* v. *Gomm*, 20 Ch. D. 562; overruling *Birmingham Canal Co.* v. *Cartwright*, 11 Ch. D. 421; and see *Trevelyan* v. *Trevelyan*, 53 L. T. 853. The rule apparently does not apply to the case of renewable leaseholds, on the ground that the covenant in this case runs with the land; *L. & S. W. R. Co.* v. *Gomm*, *suprà*, at p. 579; but it does apply to a condition for re-entry on breach of a restrictive covenant in a conveyance in fee; *Dunn* v. *Flood*, 25 Ch. D. 629.

have a lease granted (*g*); and where there was a demise for twenty-one years, with a covenant that the lessor, his heirs and assigns, would, from time to time, at any time before the expiration of the term, and also before the expiration of the term to be granted by every future or renewed lease, whenever required by the lessees or the persons interested, and upon payment of a fine, grant a renewal, it was held that it was not necessary for the lessees to pay the fine or execute a new lease before the expiration of the term, but that notice of an intention to renew must be given before such expiration, and that an informal notice was sufficient (*h*); so where two partners were possessed of freeholds, with an option for the survivor to purchase the whole, if either should die during the partnership term, and the partnership was prolonged by parol arrangement, it was held that the right of pre-emption continued subsisting (*i*). Where an option of purchasing is given at what the trustees shall consider to be a fair and reasonable price, their decision, in the absence of fraud, is conclusive (*k*).

Notice by or to railway companies, &c.

Notice given by a railway or other public company (*l*) of their intention to exercise a power of compulsorily taking land (*m*), constitutes a contract binding on the company to the extent of fixing what land is to be taken (*n*); and cannot

(*g*) *Moss* v. *Barton*, 1 Eq. 474; *Buckland* v. *Papillon*, *ib.* 477.

(*h*) *Nicholson* v. *Smith*, 22 Ch. D. 640.

(*i*) *Essex* v. *Essex*, 20 B. 442; but see *Caddick* v. *Skidmore*, 2 D. & J. 52.

(*k*) *Edmonds* v. *Millett*, 20 B. 54.

(*l*) The case seems to be different with Commissioners under a Public Act, *i. e.*, where the Commissioners are merely the mouthpiece of the Crown; *R.* v. *Comrs. of Woods and Forests*, 15 Q. B. 761; *Steele* v. *Corporation of Liverpool*, 7 B. & S. 261, 265.

(*m*) As to the extent of such powers, with reference to 8 & 9 Vict. c. 20, s. 16, see *Cother* v. *M. R. Co.*, 2 Ph. 469; *Beardmer* v. *L. & N. W. R. Co.*, 1 M. & G. 112; *Sadd* v. *Maldon R. Co.*, 6 Ex. 143. As to how far tunnelling under, or throwing an arch over, property is a "taking," see *Sparrow* v. *O. W. & W. R. Co.*, 2 D. M. & G. 108; *Pinchin* v. *Blackwall R. Co.*, 1 K. & J. 46, 47, 66; 5 D. M. & G. 851; *Met. Dist. R. Co.* v. *Cosh*, 13 Ch. D. 607; *Tiverton R. Co.* v. *Loosemore*, 9 Ap. Ca. 480.

(*n*) *Adams* v. *Blackwall R. Co.*, 2 M. & G. 118.

be withdrawn by the company without the consent of the landowner (*o*); and the price, if not settled by agreement, must be determined in the manner pointed out by the Act of Parliament (*p*): but the mere service of the notice does not constitute a contract by the landowner for the sale of his land; nor is there, strictly speaking, any contract between the parties until they have come to some definite arrangement as to the terms, or until the value of the land to be taken has been ascertained by arbitration, or a jury (*q*). Thus, where the landowner, after service of the notice, stated the price which he was willing to take, but died before his offer was accepted, it was held that, although the purchase was afterwards completed at that price, there was no contract binding on the heir (*r*). Where, however, the price is ascertained, either by arbitration (*s*) or by the valuation of two surveyors (*t*), or by agreement, or the verdict of a jury (*u*), the contract is complete, and may be specifically enforced by or against the company. A notice to treat, given to and acquiesced in by tenants for life having a joint power of absolute appointment over the settled estate, does not amount

not *simpliciter* a contract.

(*o*) *Tawney* v. *Lynn R. Co.*, 16 L. J. Ch. 282; and see *R.* v. *Birmingham & Oxford R. Co.*, 15 Q. B. 634; affd. 647; and see 13 & 14 V. c. 83, s. 20, recognizing the principle as respects abandoned lines; *Barker* v. *N. S. R. Co.*, 5 R. C. 401; *L. & Y. R. Co.* v. *Evans*, 15 B. 331; *Blount* v. *Great S. & W. R. Co.*, 2 Ir. Ch. R. 40; *Lord Salisbury* v. *G. N. R. Co.*, 17 Q. B. 840; *Edinburgh R. Co.* v. *Leven*, 1 Macq. 284; and see now the Abandonment of Railways Act, 1869 (32 & 33 V. c. 114); and *Re Potteries R. Co.*, 25 Ch. D. 251; *Re Ruthin R. Act*, 32 Ch. D. 438.

(*p*) See *R.* v. *Hungerford Market Co.*, 4 B. & Ad. 327; *Salmon* v. *Randall*, 3 M. & C. 439; *Stone* v. *Commercial R. Co.*, 4 M. & C. 124; *Eccl. Comrs.* v. *Comrs. of Sewers* 14 Ch. D. 305; *Catling* v. *G. N. R. Co.*, 18 W. R. 121; *Walker* v. *E. C. R. Co.*, 6 Ha. 594; *Stamps* v. *Birmingham & S. V. R. Co.*, 2 Ph. 673; *Burkinshaw* v. *Birmingham, &c. R. Co.*, 5 Ex. 475; *ante*, p. 61; *post*, Ch. X. s. 5; *Adams* v. *Blackwall R. Co.*, 2 M. & G. 118; *Haynes* v. *Haynes*, 1 Dr. & S. 426; and see *Grierson* v. *Cheshire Lines Committee*, 19 Eq. 83.

(*q*) *Haynes* v. *Haynes*, 1 Dr. & S. 426, disapproving *Walker* v. *E. C. R. Co.*, 6 Ha. 594; and see, too, *Adams* v. *Blackwall R. Co.*, 2 M. & G. 118; *Regent's Canal Co.* v. *Ware*, 23 B. 575.

(*r*) *Re Arnold*, 32 B. 591.

(*s*) *Harding* v. *Metr. R. Co.*, 7 Ch. 154.

(*t*) *Watts* v. *Watts*, 17 Eq. 217.

(*u*) See the judgment in *Haynes* v. *Haynes*, 1 Dr. & S. 426; and *vide post*, 297.

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to such a defective exercise of the power as the Court can aid as against the remainderman (*x*), unless the price has been agreed upon (*y*): nor, if given to a person having a defeasible interest in the estate, and which is defeated by other parties in their conveyance to the company, does it give such person any right to specific performance against the company (*z*). Where notice is served on a lessee, who is restrained from alienating without his lessor's licence, the necessity of obtaining such licence is taken away by the operation of the Act (*a*).

Notice by railway companies to take part of a house.

Notice by a company under the Lands Clauses Consolidation Act, of their intention to take part only of any house, or other building or manufactory, does not amount to an agreement to take the whole, although under the 92nd section of the Act the owners may, by counter-notice, require the company to take the whole or nothing (*b*): and thereupon a Court of Equity will restrain the company from taking less than the whole (*c*): the effect of the landowner's counter-notice being to arrest the operation of the company's notice, conditionally on the landowner's being able and willing to sell the whole: but if he declines, or is unable so to do, the company's notice revives (*d*). Although the landowner can

Effect of counter-notice by landowner.

(*x*) *Morgan* v. *Milman*, 3 D. M. & G. 24.

(*y*) *Re Dyke's Estate*, 7 Eq. 337.

(*z*) *Hill* v. *G. N. R. Co.*, 5 D. M. & G. 66; in such a case the person injured may possibly have a right to a mandamus to compel the company to proceed, or to an injunction to restrain them from taking possession; see *Doo* v. *L. & Croydon R. Co.*, 1 R. C. 257; Frend & Ware, 43; Browne & T. 148.

(*a*) See sect. 119: *Slipper* v. *Tottenham R. Co.*, 4 Eq. 112.

(*b*) *R.* v. *L. & S. W. R. Co.*, 12 Q. B. 775. Although the giving of a counter-notice is always a wise precaution, it is apparently not necessary for the protection of the owner; *Richards* v. *Swansea Improvement Co.*, 9 Ch. D. 425, 433, per James, L. J. And see this case as to the interpretation of the words "a part only of any house or other building or manufactory" in sect. 92.

(*c*) *Sparrow* v. *O. W. & W. R. Co.*, 2 D. M. & G. 91: as to the effect of tunnels and arches, see *S. C.*, 108; *Ponchin* v. *Blackwall R. Co.*, 1 K. & J. 46, 47, 66; 5 D. M. & G. 851; *Furness* v. *M. R. Co.*, 6 Eq. 473. Easements are not generally included under the 85th sect., and the company cannot take an easement alone; *Re Metr. Dist. R. Co. & Cosh*, 13 Ch. D. 607; but the defect may be remedied by a special Act; *Hill* v. *M. R. Co.*, 21 Ch. D. 143.

(*d*) See 1 K. & J. 68. If the company desires a part only, and the

compel the company, when they require only a part, to take the whole of the remaining property comprised in the word "house," he cannot, it seems, compel them to take merely a portion of it (*e*). The right of giving such counter-notice is not lost, if the company, having served a notice to take part of the property, refuse to pay the price demanded for it; and it may be given at any time before the original notice matures into a contract (*f*): where the company give notice to take a part, and are served by the landowner with a counter-notice to take the whole, the amount to be secured by deposit and bond under the 85th section, before possession can be taken, is the value of the entire property (*g*). The acceptance by the company of a counter-notice which is bad, will not compel the company to take that which they are not otherwise bound to take (*h*).

As to the meaning of the word "house" under the Lands Clauses Consolidation Act.

The word "house" in the 92nd section is construed liberally; and includes everything which will ordinarily pass under that word in a conveyance (*i*). Thus, where the company required only a small portion of the garden, they were compelled to take the whole property (*k*); even where the houses were unfinished, and in a ruinous state (*l*); so, also, where they required greenhouses and ornamental pleasure ground connected with the residence, which was not touched, the rest of the land being used as a nursery garden (*m*); so,

owner will not sell that part alone, sect. 92 does not *compel* the company to take the whole, but leaves them free to abandon their original notice; *R.* v. *L. & S. W. R. Co.*, 12 Q. B. 775.

(*e*) *Pulling* v. *L. C. & D. R. Co.*, 3 D. J. & S. 661.

(*f*) *Gardner* v. *Charing Cross R. Co.*, 2 J. & H. 248; *Schwinge* v. *L. & Blackwall R. Co.*, 3 S. & G. 30.

(*g*) *Underwood* v. *Bedford R. Co.*, 7 Jur. N. S. 941; *Dadson* v. *East Kent R. Co.*, *ib.* 941; *Giles* v. *L. C. & D. R. Co.*, 1 Dr. & S. 406; *Gardner* v. *Charing Cross R. Co.*, *supra*. And the value of trade fixtures is included; *Gibson* v. *Hammersmith R. Co.*, 11 W. R. 299.

(*h*) *Treadwell* v. *L. & S. W. R. Co.*, 33 W. R. 272.

(*i*) *St. Thomas' Hospital* v. *Charing Cross R. Co.*, 1 J. & H. 400; and see particularly, *Richards* v. *Swansea, &c. Co.*, 9 Ch. D. 425.

(*k*) *Cole* v. *West London R. Co.*, 27 B. 242; *Grosvenor* v. *Hampstead R. Co.*, 1 D. & J. 446; *King* v. *Wycombe R. Co.*, 28 B. 104.

(*l*) *Alexander* v. *Crystal Palace R. Co.*, 30 B. 556.

(*m*) *Salter* v. *Metr. Dist. R. Co.*, 9 Eq. 432.

also, where the garden was one of a series, and the one furthest removed from the house to which they were all attached, each of the series being separated from the other by a brick wall, but connected with the other and with the house by a door and gravel-walk (*k*); so, too, where the company gave notice to take a piece of a paddock, used with a house and garden, but separated therefrom by a wall with a gate in it as a means of access (*l*). The fact of two houses, which are used as one for business purposes by means of internal communication, being held under different leases, does not prevent their being one house within the meaning of the section (*m*). But a cottage built upon land used as a market-garden and occupied merely for the more beneficial occupation of the land as a market-garden, does not with the land constitute a "house" within the meaning of the section (*n*); so, also, where the landowner was entitled under the same lease to a messuage and garden on one side of a public highway, and to a detached piece of pleasure ground on the opposite side, on which he was prohibited from building, and which alone the company was desirous of purchasing, it was held that the detached portion formed no part of the "house" within the meaning of the Act (*o*); so, also, where the portion, separated by the highway, was used for the purpose of pasturing horses and cows for the owner's establishment (*p*); so, in the case of two contiguous dwelling-houses, the mere continuity of the open space immediately under the roof and above the party-wall which separated the attics up to their ceiling, and the inter-communication of the drains and gutters, was held not to constitute the two dwellings a single "house" (*q*); but in one case, a vacant piece of land, not fenced off from the street, and separated from the house by a public foot-way, but forming the only means of approach

(*k*) *Hewson* v. *L. & S. W. R. Co.*, 8 W. R. 467.

(*l*) *Barnes* v. *Southsea R. Co.*, 27 Ch. D. 536.

(*m*) *Siegenberg* v. *Metr. Dist. R. Co.*, 32 W. R. 333.

(*n*) *Falkner* v. *Somerset and Dorset R. Co.*, 16 Eq. 458.

(*o*) *Ferguson* v. *L. B. & S. C. R. Co.*, 3 D. J. & S. 653.

(*p*) *Steele* v. *M. R. Co.*, 1 Ch. 275.

(*q*) *Harvie* v. *S. D. R. Co.*, 23 W. R. 202.

for vehicles, was held to be part of the "house" within the meaning of the Act (*r*). The result of the cases seems to establish that what is necessary for the convenient use and occupation of the *house*, but not what is subsidiary to the personal use and enjoyment of the *occupier*, falls within the statutory meaning of the word. It is, however, obvious that cases may occur in which garden or pleasure ground separated from a house, even by a public high-road, may be almost as material to the due enjoyment of the house as if the separating road had no existence; *e. g.*, where the road is in a cutting, and there is a bridge thrown across it.

What is a "manufactory" within the Act.

Where the company required to take part of a building which had been used as a manufactory, though such user had been discontinued for several years, they were compelled, at the instance of the landowner, not only to take the whole, but also all the machinery and trade fixtures therein (*s*). So, where a railway company gave notice of their intention to take a mill-goit and weir, which occasionally supplied the motive power for the machinery, they were compelled to take the whole manufactory, although they proposed to carry the railway over bridges which would not interfere with the water supply (*t*).

Statutory power not exhausted by single notice.

Under the above Act, a company may give a second notice to the same landowner in respect of land within the limits to which their compulsory powers extend, if, from unforeseen circumstances, the land taken under the first notice prove insufficient for the authorized purposes of the

(*r*) *Marson* v. *L. C. & D. R. Co.*, 6 Eq. 101; and see *Grierson* v. *Cheshire Lines Committee*, 19 Eq. 83; as to what is part of a "house" within the 92nd section, see *Anon.*, cited 3 De G. & S. 420.

(*s*) *Gibson* v. *Hammersmith R. Co.*, 11 W. R. 299; and as to what is a "manufactory," see *Barker* v. *N. S. R. Co.*, 2 De G. & S. 55; *Dakin* v. *L. & N. W. R. Co.*, 3 De G. & S. 414.

(*t*) *Furness* v. *M. R. Co.*, 6 Eq. 473; and cf. *Sparrow* v. *O. W. & W. R. Co.*, 2 D. M. & G. 94; *Spackman* v. *G. W. R. Co.*, 1 Jur. N. S. 790; *Richards* v. *Swansea, &c. Co.*, 9 Ch. D. 425; but see *Ruddin* v. *Metr. Board of Works*, 4 D. F. & J. 532; *Bennington* v. *Metr. Board of Works*, 54 L. T. 837.

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undertaking (*u*); but they may not make use of their compulsory powers to attain a subsidiary object, not authorized for the purposes of their undertaking (*x*); and if they attempt to do so they will be restrained by injunction (*y*). Where a landowner is entitled by notice to require the company to purchase his interest in lands affected by the undertaking, the service of such notice constitutes the relation of vendor and purchaser (*z*); but it seems now to be settled that a mere notice by a company, not followed up by entry or other proceedings, within the period limited for compulsory purchase, does not constitute such a contract as Equity will specifically enforce (*a*). In such a case the proper course for the landowner is by *mandamus* to compel the company to proceed with the other steps directed by their Act.

Notice must be acted on within reasonable time.

But the notice given by the company to the landowner cannot operate for an indefinite time; it must be acted on within a reasonable period, or it will be deemed to have been abandoned. Thus, where a railway company, within the time limited for the exercise of their compulsory powers, served notice on the landowner, but no agreement was entered into, and the time fixed by the Act for the completion of the line expired before any further steps were taken, the company was restrained from proceeding under the notice (*b*). And Lord Cairns seemed inclined to lay it down as a general rule, that where the time limited for the

(*u*) *Stamps* v. *B. & S. V. R. Co.*, 2 Ph. 673; and see *Simpson* v. *Lanc. & C. R. Co*, 15 Si. 580.

(*x*) *Eversfield* v. *Mid-Sussex R. Co.*, 3 D. & J. 286; *Dodd* v. *Salisbury R. Co.*, *ib.* 158; *Galloway* v. *Mayor, &c. of London*, 4 N. R. 77; *Stockton, &c. R. Co.* v. *Brown*, 9 H. L. C. 246; *Errington* v. *Metr. Dist. R. Co.*, 19 Ch. D. 559, 566; and compare *Simpson* v. *South Staffordshire Waterworks Co.*, 5 N. R. 70; *Wood* v. *Epsom R. Co.*, 8 C. B. N. S. 731; *Webb* v. *Manchester R. Co.*, 4 M. & C. 118; *Flower* v. *L. B. & S. C. R. Co.*, 2 Dr. & S. 330, *A.-G.* v. *G. E. R. Co.*, 6 Ch. 572.

(*y*) *Ystalyfera Iron Co.* v. *Neath, &c. R. Co.*, 17 Eq. 142.

(*z*) *Doe* v. *London and Croydon Canal Co.*, 1 R. C. 257; *R.* v. *Birmingham R. Co.*, 15 Q. B. 634, 647, n.

(*a*) See *ante*, p. 243, note (*q*), and *Regent's Canal Co.* v. *Ware*, 23 B. 575; *Leominster C. Co.* v. *Shrewsbury R. Co.*, 3 K. & J. 672.

(*b*) *Richmond* v. *N. L. R. Co.*, 3 Ch. 679, explained by Jessel, M. R., in *Ystalyfera Iron Co.* v. *Neath, &c. R. Co.*, 17 Eq. 142; and consider

completion of the works has expired, the company can no longer exercise their compulsory powers of purchasing (*c*); and in a very recent case he thus expressed his view:—"There have been cases in which a railway company has given notice to a landowner to treat for the purchase of land, and no further step has been taken either by the company or the landowner, and the extended period for completing the works has expired, and the question has been raised, Could the company in that state of things proceed with its notice to treat, and assess the compensation under the Lands Clauses Act? Were such a case now to arise, I should be disposed to think, as I was disposed to think in *Richmond* v. *North London Rail. Co.*, that if nothing more was done, and the company have slept upon their rights, and certainly if the delay cannot be explained, they should be held to be disabled from going on with any compulsory purchase, and in such a case the landowner should, as I think, be held to be disabled also. Both parties have been content to let the time run out. There is no *rei interventus*, no change of the *status quo ante*, nothing which requires to be undone. The whole matter has been a project merely; and, as a project, it has come to an end" (*d*).

Effect of notice of enfranchisement under Copyhold Acts.

It has not yet been decided whether a notice of enfranchisement under the Copyhold Acts entails liabilities on the person giving it, similar to those consequent upon a notice to treat under the L. C. C. Act (*e*); but upon principle this would seem to be so.

Answer in a Chancery suit may be a sufficient memorandum.

If a defendant by his answer to the plaintiff's bill for specific performance admits the parol agreement, but neglects to claim the benefit of the statute, this will constitute a sufficient memorandum in writing to satisfy the statute (*f*): so, too, an affidavit filed by the party to be charged (*g*);

Pinchin v. *L. & Blackwall R. Co.*, 5 D. M. & G. 851; which see also as to the landowner's remedy in case of delay by the company; 1 K. & J. 69.

(*c*) *Richmond* v. *N. L. R. Co.*, 3 Ch. 681; and see Ch. XVII. s. 6, as to the remedy by *mandamus*.

(*d*) *Tuerton, &c. R. Co.* v. *Loosemore*, 9 Ap. Ca. 480, at p. 489.

(*e*) *Ante*, p. 242.

(*f*) *Ridgway* v. *Wharton*, 3 D. M. & G. 677; *Jackson* v. *Oglander*, 2 H. & M. 465; and *vide post*, pp. 1148 *et seq.*

(*g*) *Barkworth* v. *Young*, 4 Dr. 1.

and his signature, though not alleged, will be presumed by the Court, as an affidavit must be signed before it is sworn (*g*). The statute, if relied on, must now be specially pleaded (*h*).

Written agreement after, in pursuance of a parol agreement before, marriage.

And it is now well settled that a written agreement after, in pursuance of a parol agreement before, marriage, is a sufficient memorandum within the statute (*i*).

Rent rolls, abstract, &c. insufficient;

But—and the case may be considered as an exception to the first general rule (*ii*)—where B. had entered into a parol agreement to sell an estate to W., and B.'s agent made out and signed a rent-roll, entitled "Rent-roll of lands agreed to be sold by B. to W. from May 1762, at 21 years' purchase for the clear yearly rent," and the amount of the rent was then corrected by B. in his own handwriting, and the rent-roll so altered was delivered to W., and abstracts of title were also delivered, and B. sent letters to his creditors informing them of the sale, it was held that there was no sufficient agreement (*j*); nor will a letter suggesting an abandonment of a parol agreement (*k*) take the case out of the statute; but where, at Law, an agreement was produced in the following words, viz., "A. having agreed to purchase of B. for £250 the two leasehold houses situate, &c., B. hereby agrees to paper and paint, A. to pay £230 at the time of the contract, and the remaining £20 on the completion of the painting," the agreement to purchase, although recited as an existing

and letters to creditors;

or letter written as an abandonment.

Recital of agreement, held sufficient.

(*g*) *Barkworth* v. *Young*, 4 Dr. 1.

(*h*) R. S. C. 1883, Ord. XIX. r. 15; *Catling* v. *King*, 5 Ch. D. 660; and see *Toule* v. *Topham*, 37 L. T. 308.

(*i*) *Taylor* v. *Birch*, 1 V. Sen. 297; *Barkworth* v. *Young*, 4 Dr. 1; *Hammersley* v. *De Biel*, 12 C. & F. 64 n.; and *post*, pp. 1141 *et seq.*

(*ii*) *Ante*, p. 239.

(*j*) *Whaley* v. *Bagnel*, 1 Br. P. C. 345 (the decision was upon the Irish Statute of Frauds, which corresponds with the English Act); *Cooke* v. *Toombs*, 2 Anst. 420; and see *Cass* [illegible]

(*k*) *Gosbell* v. *Archer*, 2 A. & E. 500; *Fyson* v. *Kitton*, 3 C. L. R. 705; see *Tauney* v. *Crouther*, 3 Br. C. C. 161, 318, where the vendor being pressed to sign the agreement, wrote that "his word should be as good as any security he could give," and was held bound; but this seems to be bad law; see *Clinan* v. *Cooke*, 1 Sch. & Lef. 34; *Maunsell* v. *White*, 1 J. & L. 567; and see *Forster* v. *Hale*, 3 V. 713; and *Tanner* v. *Smart*, 6 B. & C. 603. See, too, *Pain* v. *Coombs*, 1 D. & J. 34; *Buckmaster* v. *Russell*, 10 C. B. N. S. 745.

agreement, was considered to form part of the agreement produced (*l*).

Petition for investment of trust fund, and order directing inquiries.

So a petition by a landowner, who was also tenant for life of a settled fund, praying that it might be invested in purchase of the land, and an order merely directing an inquiry as to whether the proposed purchase was a proper one, and as to the title, have been held not to constitute a binding contract as against the landowner; but the Court raised the question as to what would have been the effect of the order, had it gone on in the usual way to direct that if the purchase were a proper one and the title good, the sale should be carried into effect (*m*).

Document relied on must consist with alleged parol agreement.

It is, of course, necessary that the letter or other document relied on should be consistent with the parol agreement set up by the party relying on it (*n*).

Whether both parties must be named.

As to both parties being named:—it is stated to have been said by Lord Cowper (Lord Keeper), "that if a man being in company makes offers of a bargain, and then writes them down and signs them, and the other person then takes them up and prefers his bill, there will be a sufficient agreement" (*o*); and the *dictum*, which was extrajudicial, is cited by Lord St. Leonards (*p*); however, in *Boyce* v. *Green* (*q*), a memorandum in these words, "Sold 100 Mining Purdies at 17*s*. 6*d*." and signed by the vendor, was held insufficient, as not mentioning the name of the purchaser (*r*). So, in a modern case, a document in the following terms, "A. agrees to buy the whole of the lots of marble, purchased by B. at

(*l*) *Hall* v. *Betty*, 4 Man. & G. 410; see *De Porquet* v. *Page*, 20 L. J. Q. B. 28.

(*m*) *Shrewsbury* v. *Shrewsbury*, 18 Jur. 397.

(*n*) *Cooper* v. *Smith*, 15 Ea. 103.

(*o*) *Coleman* v. *Upcot*, 5 Vin. Ab. 527.

(*p*) Sug. 131; it may be inferred from the report that the agreement in *Knight* v. *Crockford*, 1 Esp. 190, contained the plaintiff's name.

(*q*) Bat. 608.

(*r*) See *Seagood* v. *Meale*, Ch. Prec. 560; *Champion* v. *Plummer*, 1 B. & P. N. R. 254; and *Graham* v. *Musson*, 7 Sc. 769.

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Lyme Cobb, at 1*s*. per foot," was held insufficient, because B.'s name *as seller* was not mentioned in it (*s*); but this decision has been disapproved; and in a later case, where J. W., a duly authorized agent of R., the seller, made the following entry in the book of N., the buyer, "Mr. N. 32 sacks culasses at 39*s*. 280 lbs., to wait orders, J. W.," it was held that there was a sufficient memorandum in writing to satisfy the statute; and that parol evidence was admissible to show that N. was a baker, and R. a dealer in flour (*t*). So, it has been held, that, in order to bind the purchaser by his own signature, either the name of the vendor must appear by the agreement or in the conditions or particulars thereby referred to, or the vendor, or the auctioneer, as his agent, must sign the agreement (*u*). Later cases have carried the rule still further; and it appears to be now clearly settled that, in order to satisfy the statute, *both* parties should be specified, either nominally or by a sufficient description (*x*); and the reference must be unmistakeable; the mere description of one of the contracting parties as "your client," in a letter addressed to his solicitor, has been held insufficient (*y*). Thus, the usual memorandum signed by the auctioneer, and confirming the contract on behalf of "the vendor," is insufficient, if the vendor is not named or described in such memorandum, or in the particulars or conditions (*z*); nor will it be sufficient if the contract is not signed at the time by the purchaser, but is afterwards signed by the auctioneer on the authority of a letter from the purchaser's solicitor (*a*). But such a confirmation is sufficient if the particulars identify, although they do not name the vendor (*b*);

Result of recent cases.

(*s*) *Vandenbergh* v. *Spooner*, L. R. 1 Ex. 316.

(*t*) *Newell* v. *Radford*, L. R. 3 C. P. 52, and see *Sarl* v. *Bourdillon*, 1 C. B. N. S. 188

(*u*) *Wheeler* v. *Collier*, M. & M. 123; and see *Jacob* v. *Kirk*, 2 Mo. & R. 221.

(*x*) *Williams* v. *Lake*, 2 E. & E. 349, a case under the 4th section; *Williams* v. *Byrnes*, 1 Mo. P. C. N. S. 154, a case under the 17th section.

(*y*) *Shelton* v. *Cole*, 1 D. & J. 587.

(*z*) *Potter* v *Duffield*, 18 Eq. 4; *Thomas* v. *Brown*, 1 Q. B. D. 714; and see *Williams* v. *Jordan*, 6 Ch. D. 517; *Donnison* v. *People's Café Co.*, 45 L. T. 187, *Jarrett* v. *Hunter*, 34 Ch. D. 182.

(*a*) *Matthews* v. *Baxter*, 28 L. T. 669.

(*b*) *Commins* v. *Scott*, 20 Eq. 11.

as where they describe him as "the executor (*c*) or personal representative (*d*) of A. B.," or as "a trustee selling under a trust for sale" (*e*), or even where they merely state that the sale is "by direction of the proprietor" (*f*). But the Court will not be astute to discover descriptions which a jury could not identify (*g*). Where, however, the agreement is wanting in the name of either of the parties, it may be supplied by any other writing connected with it (*h*). Notwithstanding the recent decisions, the vendor's name is seldom inserted in the agreement on a sale by auction, and the omission may often lead to serious difficulty (*i*).

As to the names in the case of an agreement by letter.

In the case of a letter, if the name of the party to whom it is addressed appear in an endorsed direction, or be written at the foot of the letter, no difficulty on the above point can arise: if an envelope be used, the name may often not appear in the letter; but the Court, it is conceived, would receive evidence connecting the envelope with the inclosure (*k*). Nor need the name of the sender be signed: it is sufficient if the offer be made on a memorandum form, so printed as to show that it comes from the person making the offer (*l*).

Offer by letter, when binding.

A letter, it may be remarked, binds the writer from the time of the inception of its transmission, not of its receipt

(*c*) *Hood* v. *Lord Barrington*, 6 Eq. 218, but the first paragraph of the judgment cannot be relied on as sound law.

(*d*) *Towle* v. *Topham*, 37 L. T 308.

(*e*) *Catling* v *King*, 5 Ch. D. 660; and see *Bourdillon* v. *Collins*, 24 L. T. 314, where the abstract was held to be sufficiently connected with the contract as to identify the vendor, who was described as trustee.

(*f*) *Sale* v. *Lambert*, 18 Eq. 1; *Rossiter* v. *Miller*, 3 Ap. Ca. 1124; and see *Beer* v. *London and Paris Hotel Co.*, 20 Eq 412.

(*g*) Per Jessel, M. R, in *Commins* v. *Scott*, 20 Eq. 16, *Thomas* v. *Brown*, 1 Q. B D. 714.

(*h*) *Warner* v. *Willington*, 3 Dr. 523. See, too, *Shelton* v. *Cole*, 1 D. & J. 596.

(*i*) See *Warner* v. *Willington*, and *Shelton* v. *Cole*, *supra*, and *Smith* v. *Neale*, 2 C. B. N. S. 67, *Reuss* v. *Picksley*, L. R. 1 Ex. 342.

(*k*) *Sale* v. *Bourdillon*, 1 C. B. N. S 188, and see *Kronheim* v. *Johnson*, 7 Ch D. 60, where a signed and an unsigned document dealing with the same subject-matter, but not referring the one to the other, were contained in the same envelope.

(*l*) *Tourret* v. *Cripps*, 48 L. J. Ch. 567.

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Party accepting offer is not liable for delay in the post-office.

by the other party (*m*): and a person bound to accept or reject an offer by a particular post, and duly posting his letter, is not responsible for delay in the post-office (*n*); even although, by mistake, he date his reply a day in advance, so that, through such delay, the letter be delivered at a time apparently consistent with its erroneous date (*o*); and the same principle has been applied to the case of a letter of acceptance, duly posted, but not delivered to the person addressed (*p*). The reason of the rule is, that the parties have made the post-office their common agent (*p*). In one case, where the offer was made by telegram, and accepted by a letter duly posted, the party making the offer was held entitled to retract it after the letter was posted, but before it was received (*q*); in this case the post-office was the agent of one party only, not of both.

General description of property sufficient.

A general description of the estate,—*e.g.*, "Mr. O.'s house" (*r*), or "my house" (*s*), or "the property in Cable Street" (*t*), or "the house in Newport" (*u*), or "the intended new public-house at Putney" (*x*), or "the premises" (*y*), or "The Jolly Sailor Offices, &c." (*z*), or "this place" (*a*), or

(*m*) *Potter* v. *Sanders*, 6 Ha. 1; see *Hermaman* v. *Coryton*, 5 Ex. 453, and compare *Wall's case*, 15 Eq. 18; and *Household Fire Insurance Co.* v. *Grant*, 4 Ex. D. 216.

(*n*) *Adams* v. *Lindsell*, 1 B. & Ald. 681; *Duncan* v. *Topham*, 8 C. B. 225.

(*o*) See *Dunlop* v. *Higgins*, 1 H. L. C. 396; but see comments on this case in *British and American R. Co.* v. *Colson*, L. R. 6 Ex. 108; and see now *Wall's case*, *ubi supra*, and generally on this subject Benjamin, 48 *et seq.*; Buckley, 57, and an article in the American Law Review, vol. 7, p. 433. *Quære*, where the receiver has done an irrevocable act upon the error into which he has been led by the blunder of the sender.

(*p*) *Household Fire Insurance Co.* v. *Grant*, 4 Ex. D. 216; see judgment of Thesiger, L. J.

(*q*) *Quenerduaine* v. *Cole*, 32 W. R. 185.

(*r*) *Ogilvie* v. *Foljambe*, 3 Mer. 61.

(*s*) *Cowley* v. *Watts*, 17 Jur. 172.

(*t*) *Bleakley* v. *Smith*, 11 Si. 150.

(*u*) *Owen* v. *Thomas*, 3 M. & K. 353; and see *Rose* v. *Cunynghame*, 11 V. 550, where the description of the property, as "the land I bought of Mr. Peters," seems to have been sufficient; although, the terms of the purchase not appearing, it was held that there was no agreement.

(*x*) *Wood* v. *Scarth*, 2 K. & J. 33.

(*y*) *Ibid.*; and see *M'Murray* v. *Spicer*, 5 Eq. 527; and see *Ex p. Nat. Prov. Bank*, 4 Ch. D. 241.

(*z*) *Naylor* v. *Goodall*, 47 L. J. Ch. 53.

(*a*) *Waldron* v. *Jacob*, 5 I. R. Eq. 131.

"property purchased at £420 at Sun Inn, Pinxton, on 29th March" (*b*)—is sufficient, if parol evidence can be produced to show what property was intended: but if the property be described by reference to a plan or instrument, so vague as not to admit of a legal construction, the defect would, it is conceived, be fatal (*c*); unless the contract was in effect made in two parts by a sufficient memorandum being endorsed on the plan (*d*); so, an agreement to lease the "coals, &c.," under specified closes, would seem to be too ambiguous to be enforced (*e*); but an agreement for a lease of a farm containing about 437 acres, "except 37 acres thereof," which were not specified, was held capable of being enforced, the Court giving the lessee the right of selection (*f*); so an agreement to take a lease of all those two seams of coal, known as the two-feet coal and the three-feet coal, "lying under lands *hereafter to be defined* in the Bank End Estate," was considered sufficiently definite, the true construction being that the boundaries of the whole estate were to be afterwards ascertained (*g*); so, the reservation in a contract of "the right to search for and work mines, minerals," *&c.* (*h*), and the words "goodwill, *&c.*" in a contract for the sale of a foundry (*i*), have been considered sufficiently free from ambiguity to enable the Court to enforce specific performance.

But there must be some description.

And it is immaterial that the agreement does not distinguish the tenures of the several portions of the estate (*j*); or even the tenure of the whole estate, if this can be shown to have been in the knowledge of both parties (*k*). But there must be *some* description of the property: *e. g.*, a memorandum that a party has disposed of "his writings," (*i. e.*, title deeds,) is insufficient (*l*).

(*b*) *Shardlow* v. *Cotterell*, 20 Ch. D. 90.

(*c*) *Monro* v. *Taylor*, 8 Ha. 51.

(*d*) *Nene Valley Drainage Commissioners* v. *Dunkley*, 4 Ch. D. 1.

(*e*) *Price* v. *Griffith*, 1 D. M. & G. 80; and see *Stuart* v. *L. & N. W. R. Co.*, 1 D. M. & G. 721.

(*f*) *Jenkins* v. *Green*, 27 B. 437.

(*g*) *Haywood* v. *Cope*, 25 B. 140.

(*h*) *Parker* v. *Tuswell*, 2 D. & J. 559.

(*i*) *Cooper* v. *Hood*, 26 B. 293.

(*j*) *Monro* v. *Taylor*, 8 Ha. 51.

(*k*) *Cowley* v. *Watts*, 17 Jur. 172.

(*l*) *Seagood* v. *Meale*, Ch. Prec. 560.

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The writing must fix all the terms of the agreement.

So, all the essential terms of the contract must be fixed (*m*); or, as in the case of the arbitration bond (*n*), the means of compulsorily fixing them must be provided: and the Court will enforce a contract in general terms where the law can supply the details (*o*). A receipt for the deposit has been held insufficient to bind the contract, because it did not state either the price or what proportion the deposit bore to the price (*p*); so, an alleged partnership in a mine was held to be not sufficiently proved by receipts for sums of money on account of a share in the mine, though such sums were exactly a moiety of the rent (*q*); so, where the price was fixed subject to variation in respect of a rent-charge, and it did not appear whether the amount was 5*s*. or 1*s*. *per annum*, the defect was held fatal (*r*); so, where the agreement for "a lease" did not specify the intended duration of the term, and the nature of reservations (*s*), or the date of commencement of the term (*t*); so, where, on a sale of the surface, it was provided that a royalty of 6*d*. per ton should be paid for the minerals, and that the same if not worked should be paid for as if gotten; there being no means provided for ascertaining what quantity would have to be paid for (*u*); so, a stipulation on the sale of a foundry that "a large portion" of the purchase-money was to be left in the business (*x*); so, upon a sale subject to conditions, the auctioneer's receipt or entry

(*m*) See generally on the subject, Fry, pt. iii. ch. 3.

(*n*) *Ante*, p. 240, n. (*t*).

(*o*) *Hampshire* v. *Wickens*, 7 Ch. D. 555; Fry, 156.

(*p*) *Blagden* v. *Bradbear*, 12 V. 466; and see *Clerk* v. *Wright*, 1 Atk. 12; *Elmore* v. *Kingscote*, 5 B. & C. 583; *Clinan* v. *Cook*, 1 Sch. & L. 22; *Milnes* v. *Gery*, 14 V. 400, 406; *Morgan* v. *Milman*, 3 D. M. & G. 24.

(*q*) *Caddick* v. *Skidmore*, 2 D. & J. 52.

(*r*) *Lord Middleton* v. *Wilson*, Sug. 135. But might it not be sufficient if, in such a case, the plaintiff stated the agreement according to that alternative of construction which is least favourable to himself?

(*s*) *Cox* v. *Middleton*, 2 Dr. 209, 219; *Davis* v. *Jones*, 25 L. J. C. P. 91; *Fitzmaurice* v. *Bayley*, 9 H. L. C. 78, where the lessee had ratified the contract. But see *Hampshire* v. *Wickens*, 7 Ch. D. 555, where the Court was able to supply the conditions.

(*t*) *Marshall* v. *Berridge*, 19 Ch. D. 233; overruling *Jaques* v. *Millar*, 6 Ch. D. 153.

(*u*) *Williamson* v. *Wootton*, 3 Dr. 210.

(*x*) *Cooper* v. *Hood*, 26 B. 293.

would be void, unless it were actually annexed, or clearly referred, to the conditions (*y*).

Agreement for sale at a specified price *plus* a share of profits on re-sale.

Where there was an agreement for the sale at a specified price, and "20 per cent. upon any sum which the property might realize above that price" at a sale by auction, which was advertised to take place, and the vendor withdrew the property from the sale, it was held that there was a valid contract for purchase at the price specified, without the addition of any per-centage (*z*).

Price determinable by valuation, &c.

It appears probable that a general agreement to sell "at a fair valuation" may be enforced; and the Court will, if necessary, direct a reference to ascertain the price (*a*): but where the mode of valuation is specified, it must be strictly followed; for instance, where the price is to be determined by A. and B., or an umpire selected by them, and they fail to agree upon the price, or to name an umpire, the Court can give no relief (*b*): so, as a general rule, if it is to be settled by arbitration (*c*). It has even been held that, in the latter case, the terms of the award must, unless there be an agreement to the contrary, be settled while both parties are

(*y*) *Hinde* v. *Whitehouse*, 7 Ea. 558, 569; *Kennorthy* v. *Schofield*, 2 B. & C. 945; and see *Coles* v. *Trecothick*, 9 V. 234; Sug. 130; *Wood* v. *Midgley*, 5 D. M. & G. 41; *Pearce* v. *Corf*, L. R. 9 Q. B. 210; *Rishton* v. *Whatmore*, 8 Ch. D. 467.

(*z*) *Langstaff* v. *Nicholson*, 25 B. 160. See and distinguish *Bromley* v. *Jeffries*, 2 Vern. 415.

(*a*) See *Milnes* v. *Gery*, 14 V. 400, 407; *Lord Lonsdale* v. *Gasharth*, cited 12 V. 108 (where the decree seems, however, to have been by consent); *Gregory* v. *Mighell*, 18 V. 328, 334; *Pritchard* v. *Ovey*, 1 J. & W. 396; *Price* v. *Assheton*, 1 Y. & C. 82, 441; *Morgan* v. *Milman*, 3 D. M. & G. 24; 1 Dav. 523; *et contrà*, *Gourlay* v. *Duke of Somerset*, 19 V. 430; *Agar* v. *Macklew*, 2 S. & S. 418; *Logan* v. *Le Mesurier*, 6 Mo. P. C. 132. Where such an agreement was made a rule of Court under a consent clause, the Queen's Bench refused to grant an attachment; *Re Hemingway*, 15 Q. B. 305, n., 309.

(*b*) *Milnes* v. *Gery*, 14 V. 400; and see *Cooth* v. *Jackson*, 6 V. 12, 34; *Gourlay* v. *Duke of Somerset*, 19 V. 431; *Collins* v. *Collins*, 26 B. 306; and see *Scott* v. *Corp. of Liverpool*, 3 D. & J. 334, 367; *Scott* v. *Avery*, 5 H. L. C. 811; *Vickers* v. *Vickers*, 4 Eq. 529; and see *Houghton* v. *Bankart*, 3 D. F. & J. 16; a case of improper interference by the Court with the arbitrator's authority.

(*c*) *Morgan* v. *Milman*, 3 D. M. & G. 24, 35; *Darbey* v. *Whitaker*, 4 Dr. 134; *Tillett* v. *Charing Cross R. Co.*, 26 B. 419.

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living, as the death of either, generally speaking, revokes the power of the arbitrators or umpire (*d*): but, in the reported case, a stipulation that the award should be delivered to the parties (not naming their representatives) by a specified day, seems to have been considered to indicate an intention merely to delegate a personal authority: and there was a different decision in an earlier case in Equity, where (such stipulation being wanting) the general facts were very similar (*e*). Where, however, it is not of the essence of the contract that the value should be fixed by arbitration, the Court may, it seems, enforce the agreement and if necessary ascertain the price (*f*).

Agreement to take fixtures at a valuation.

A distinction has been properly drawn between an agreement that the price of the property itself shall be settled by a valuation, and an agreement, upon the sale of buildings at a specified price, that certain plant and machinery shall be taken at a valuation (*g*). In one case (*h*), V.-C. Kindersley refused to enforce specific performance of a contract to purchase the lease and goodwill of a public house at a specified price, and the stock and fixtures at a valuation: but, in a later case, where the contract fixed the price for the estate and provided that the purchaser should take certain furniture and chattels at a valuation to be made by valuers to be mutually agreed upon, and the vendor refused to appoint a valuer or to complete the sale, the Court of Appeal, affirming V.-C. Stuart, considered that the clause providing for the purchase of the furniture, &c., was merely a minor and subsidiary part of the agreement, and not, as in *Darbey* v. *Whitaker*, of the essence of the bargain, and

(*d*) *Blundell* v. *Brettarch*, 17 V. 232, 242; and see Russell on Arbitration, 170.

(*e*) *Belcher* v. *Reynolds*, 2 Ken. pt. 2, 87.

(*f*) *Dinham* v. *Bradford*, 5 Ch. 519.

(*g*) *Jackson* v. *Jackson*, 1 S. & G. 184; see *Cumberland* v. *Bowes*, 3 C. L. R. 149, as to meaning of "a fair valuation" on contract for sale of farming stock.

(*h*) *Darbey* v. *Whitaker*, 4 Dr. 134, *sed quære? Jackson* v. *Jackson*, does not seem to have been cited; see comments on these cases in *Richardson* v. *Smith*, 5 Ch. 648, 652, 654.

decreed specific performance of the contract, except so far as it related to the personal chattels (*i*). In all cases where such is the intention of the parties, the contract should clearly show that it can be specifically enforced, so far as it relates to the land, without reference to the fixtures or articles which are to be taken at a valuation. The agreement ought to provide that, in the event of a valuation not being made in the mode specified, the fixtures, &c., shall be taken at their fair value (*k*).

As to arbitration under the Common Law Procedure Act, 1854.

By the 12th section of the Common Law Procedure Act, 1854 (*l*), it is enacted, that if, in any case of arbitration, the document authorizing the reference provide that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator, or if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one; or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, or if any appointed umpire or third arbitrator refuse to act or become incapable of acting, or die, and the terms of the document authorizing the reference do not show that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one, then—after notice and default, as therein mentioned—a judge of any of the Superior Courts of Law or Equity may appoint an arbitrator, umpire or third arbitrator, as the case may be, who shall have the same power of acting in the reference, and of making an award, as if he had been appointed by the consent of all parties. It has been decided that these provisions are retrospective, and that they apply not only to references authorized by any document,

(*i*) *Richardson* v. *Smith*, 5 Ch. 648. The Court will in such a case compel the vendor to allow the valuation to be made; *Smith* v. *Peters*, 20 Eq. 511.

(*k*) *Ante*, p. 257, n. (*a*).

(*l*) 17 & 18 V. c. 125.

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but also otherwise, as by Act of Parliament, or by parol (*m*). Where there was a contract for purchase at a price to be ascertained by two valuers, or their umpire, and the valuers could not agree in the nomination of an umpire, Lord Romilly held that the matter was one merely of appraisement, and not of arbitration, and that he had no power under the Act to interfere (*n*); and this decision has been approved and followed in a case at Law, where it was held that a misstatement as to rental in the particulars, though a proper subject for compensation within the conditions, was not a difference which might be referred to arbitration under the Act; and that neither party could, under section 13, appoint his own nominee as sole arbitrator (*o*). But the cases of *Collins* v. *Collins* and *Bos* v. *Helsham* must not be taken to comprehend every case of compensation or value. Thus, where, in order to ascertain the value of the property, or the amount of compensation to be awarded, the matter assumes the character of a judicial inquiry, as, *e. g.*, where the valuers have to adjudicate upon a point of law, or a question of right between the parties, arising out of the fact, the matter ceases to be a simple valuation, and may properly be considered as one of arbitration (*p*).

Where the submission has been made a rule of Court, specific performance of the award may still be enforced.

By the 17th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), it is provided that when in any case the document authorizing the reference is, or has been, made a rule or order of any of the Superior Courts of Law or Equity, no other of such Courts shall have jurisdiction to entertain any motion respecting the arbitration or award; but it has been held that this provision does not

(*m*) *Re Lord*, 1 K. & J. 90; see, however, *Dinham* v. *Bradford*, 5 Ch. 519.

(*n*) *Collins* v. *Collins*, 26 B. 306; *Re Dawdy*, 15 Q. B. D. 426, and on the same principle the Court refused to set aside the umpire's award, as being that of a valuer and not that of an arbitrator; *Re Carus-Wilson*, 18 Q. B. D. 7. See, too, *Leeds* v. *Burrous*, 12 Ea. 1; *Lee* v. *Hemingway*, 15 Q. B. 305; and see *Turner* v. *Goulden*, L. R. 9 C. P. 57, and *Jenkins* v. *Betham*, 24 L. J. C. P. 94.

(*o*) *Bos* v. *Helsham*, L. R. 2 Ex. 72.

(*p*) *Re Hopper*, L. R. 2 Q. B. 367; *Re Anglo Italian Bank*, *ib.* 452; see, too, *Vickers* v. *Vickers*, 4 Eq. 529, 536.

oust the jurisdiction of a Court of Equity to entertain a suit for the specific performance of the award, although the submission has been made a rule of one of the Superior Courts of Common Law (*q*).

Reference to other documents containing terms is sufficient.

It is not necessary that the terms should appear on the face of the instrument signed by the party to be charged; which, when an agreement has to be made out from correspondence, is seldom the case: it is sufficient if the instrument refer to other documents (such as conditions of sale, previous letters, or, in fact, any other writings), which contain the terms (*r*); and where the contract is to be found in a correspondence, as distinguished from a particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration (*s*).

If reference is clear.

Such writings, however, must be clearly referred to (*t*); and, unless their entire contents are to form part of the agreement, it must distinctly appear what is, and what is not, to be so included: *e. g.*, where the signed writing referred to such of the clauses contained in a specified paper as had been read at a meeting between the parties, not stating *which* had been so read, it was held bad for uncertainty (*u*).

Patent ambiguity

It will be remarked (*x*) that in the last case, there was a

(*q*) *Blackett* v. *Bates*, 2 H. & M. 610, rev. on other grounds, 1 Ch. 117; and compare *Smith* v. *Whitmore*, 1 H. & M. 576; but see sect. 11 of the Act.

(*r*) *Clinan* v. *Cooke*, 1 Sch. & L. 22, 33; *Allen* v. *Bennet*, 3 Taun. 169; *Dobell* v. *Hutchinson*, 3 A. & E. 355; *Laythoarp* v. *Bryant*, 2 Bing. N. C. 735; *Blagden* v. *Bradbear*, 12 V. 471; *Verlander* v. *Codd*, T. & R. 357; *Rudgway* v. *Wharton*, 6 H. L. C. 238, 257, per Lord Cranworth; cf. *Peirce* v. *Corf*, L. R. 9 Q. B. 210, where the documents, not being connected together, were held insufficient to constitute an agreement; and *Kronheim* v. *Johnson*, 7 Ch. D. 60, where they were held insufficient to constitute a declaration of trust.

(*s*) *Hussey* v. *Horne-Payne*, 4 Ap. Ca. 311.

(*t*) *Boydell* v. *Drummond*, 11 Ea. 142; *Boyce* v. *Greene*, Bat. 608; *Jacob* v. *Kirk*, 2 Mo. & R. 221; *Price* v. *Griffith*, 1 D. M. & G. 80; *Ridgway* v. *Wharton*, *suprà*; *Nene Valley Drainage Commissioners* v. *Dunkley*, 4 Ch. D. 1.

(*u*) *Brodie* v. *St. Paul*, 1 V. 326, 333; see *Clinan* v. *Cooke*, 1 Sch. & L. 36; but see as to uncertainty where there has been part performance, *Vouillon* v. *States*, 2 Jur. N. S. 845.

(*x*) See 1 Sch. & L. 36.

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and defective reference distinguished.

defect *patent* on the face of the agreement: the agreement itself, according to its own grammatical construction, raised the question as to which of the clauses were intended: but, in the case of a mere imperfect reference to another instrument, parol evidence is admissible to ascertain its identity (*y*); so, parol evidence is admissible to explain the sense in which words, in themselves unintelligible, were used by the parties (*z*); or the peculiar meaning which local, professional, or trade usage has attached to particular expressions (*a*); or to prove the existence, at the date of the agreement, of facts material to its construction (*b*).

Parol evidence admissible to explain imperfect reference.

General reference to other instrument sufficient.

And it appears that, at least in the case of letters, there need not be any specific description of, nor even an *express* reference to, the prior documents; it will be sufficient if the Court be clearly satisfied that a reference was in fact intended, and of the identity of the instrument.

For instance, where (*c*) A., the owner of W. farm, on the 5th July wrote a note in the third person to B. informing him that C. had made an offer for the farm, at a specified price, but that, if B. chose to have it at that price, C. would decline the purchase in his favour; B., it was alleged, wrote a note in reply, accepting the offer, but such note was not forthcoming: on the 11th July A. wrote to B., "I have just received yours; and am glad you have determined to purchase the W. farm: I will write to C. to inform him you have agreed to purchase the estate;"—Sir William Grant, relying on the words "determine" and "agree," as denoting an acceptance by B. of a previous proposal by A., instead of, as might have been the case, an independent offer by B., considered that the letter of the 11th was sufficiently connected with the note of the 5th, to show that A. agreed to

(*y*) See *Clinan* v. *Cooke*, 1 Sch. & L. 33; *Saunderson* v. *Jackson*, 2 B. & P. 238; and see *Jackson* v. *Oglander*, 2 H. & M. 465, 472; *Bolckow* v. *Seymour*, 17 C. B. N. S. 107; *Ridgway* v. *Wharton*, 6 H. L. C. 238.

(*z*) *Sweet* v. *Lee*, 3 Man. & Gr. 452.

(*a*) *Post*, p. 1090 *et seq.*

(*b*) *Monro* v. *Taylor*, 8 Ha. 56.

(*c*) *Western* v. *Russell*, 3 V. & B. 187.

sell upon the terms of that note: and specific performance was decreed accordingly.

So, upon a sale of goods, a subsequent letter written by the purchaser, and containing the following expressions, "The tobacco I want immediately forwarded; I likewise want the invoice of the rice and other tobacco," was held to be sufficiently connected with the previous entries of sale of the articles in the vendor's order book (*d*).

So, a letter from the purchaser's solicitor to the vendor's solicitor, merely headed with the names of their respective clients, and undertaking personally to settle the purchase in two months, if that would be satisfactory, has been held to be a contract binding the solicitor (*e*).

But where the plaintiff in a bill for the specific performance of an alleged parol contract to take a lease of a house relied on a letter written by the defendant, in which the latter agreed to take the house for seven years on specified terms, but did not fix any date for the commencement of the lease, and on another letter written by the defendant, in which the date of commencement was supplied and further terms were added to which the plaintiff did not agree, it was held that there was no memorandum sufficient to satisfy the statute (*f*).

(*d*) *Allen* v. *Bennet*, 3 Taun. 169; and see *Morgan* v. *Holford*, 1 S. & G. 101; cf. *Peirce* v. *Corf*, L. R. 9 Q. B. 210; and *Matthews* v. *Baxter*, 28 L. T. 669; and as to connecting one letter with another, although there is no express reference, *Verlander* v. *Codd*, T. & R. 352; *Greene* v. *Cramer*, 2 Con. & L. 54; *Skinner* v. *M'Douall*, 2 De G. & S. 265; *Hamilton* v. *Terry*, 11 C. B. 954; *Alcock* v. *Delay*, 4 E. & B. 660; *Warner* v. *Willington*, 3 Dr. 523; *Wood* v. *Scarth*, 2 K. & J. 33; *Baumann* v. *James*, 3 Ch. 508; *Long* v. *Millar*, 4 C. P. D. 450; *Shardlow* v. *Cotterell*, 20 Ch. D. 90; but see *Shelton* v. *Cole*, 1 D. & J. 587.

(*e*) *Powers* v. *Fowler*, 4 E. & B. 511.

(*f*) *Nesham* v. *Selby*, 7 Ch. 406; and see *Marshall* v. *Berridge*, 19 Ch. D. 233; overruling *Jacques* v. *Millar*, 6 Ch. D. 153. See also *Rock Portland Co.* v. *Wilson*, 52 L. J. Ch. 214; *Wyse* v. *Russell*, 11 L. R. Ir. 173; *White* v. *M'Mahon*, 18 L. R. Ir. 460. But it is sufficient, if the date of commencement can be clearly made out from the documents, *Phelan* v. *Tedcastle*, 15 L. R. Ir. 169; *i. e.* the documents forming the contract, *Wood* v. *Aylward*, 57 L. T. 54.

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So, also, a reference in a signed document to "the agreement which your client alleges he has entered into" has been held insufficient (*g*); so, too, a letter signed by the party to be charged, and containing the following passage, "Previously to paying the amount (then followed an illegible word) for tithes and glebe, it would be advisable to have some information as to title;" so, too, a letter from an alleged purchaser inclosing and referring to a draft conveyance which recited that he had agreed to purchase land (*h*).

Tests of sufficiency in cases of correspondence.

In cases of correspondence the difficulty generally is, to determine whether there has been a concluded agreement or merely a treaty (*i*); as to which the following rule seems deducible from the authorities.

It must contain a clear accession by both parties to the same terms.

If the original offer leave nothing uncertain on the face of it (*k*), and be met by a simple acceptance, the treaty is, of course, concluded; but if the original offer leave anything to be settled by future arrangement, it is merely a proposal to enter into an agreement (*l*): so if the reply be either more or less than a simple acceptance, the variation must be acceded to by the original proposer; or there is no agreement (*m*): and this state of things will continue, until there is, upon the face of the correspondence, "a clear accession on both sides to one and the same set of terms" (*n*).

(*g*) *Jackson* v. *Oglander*, 2 H. & M. 465; see, too, *Shelton* v. *Cole*, 1 D. & J. 587, and *ante*, p. 252.

(*h*) *Munday* v. *Asprey*, 13 Ch. D. 855.

(*i*) See *Huddleston* v. *Briscoe*, 11 V. 583, 591; *Stratford* v. *Bosworth*, 2 V. & B. 341, 345; *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Archer* v. *Baynes*, 5 Ex. 625.

(*k*) *Honeyman* v. *Marryat*, 6 H. L. C. 112.

(*l*) *Chinnock* v. *Marchioness of Ely*, 4 D. J. & S. 638; *Rummens* v. *Robins*, 3 D. J. & S. 88; *Wood* v. *Midgley*, 5 D. M. & G. 41; *Goodall* v. *Harding*, 52 L. T. 126.

(*m*) *Holland* v. *Eyre*, 2 S. & S. 194, *Smith* v. *Surman*, 9 B. & C. 569, *Heyward* v. *Barnes*, 23 L. T. O. S. 68, *Ball* v. *Bridges*, 22 W. R. 552.

(*n*) *Thomas* v. *Blackman*, 1 Coll. 312; and see *Cowley* v. *Watts*, 17 Jur. 172; *Cheesley* v. *Fuller*, 13 C. B. 122, and as to an immaterial addition to an acceptance, *Clue* v. *Beaumont*, 1 De G. & S. 397; *Gibbins* v. *North East Metropolitan Asylum District*, 11 B. 1. As to a special acceptance required by the terms of the original offer, see *Boys* v. *Ayerst*, 6 Mad. 316, *Taylor* v. *Portington*, 7 D. M. & G. 328.

Where on simple acceptance, a formal agreement is required.

Where, however, there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the Court from enforcing the final agreement so arrived at (*o*). But if the stipulation as to a formal contract is a term of the assent, leaving it open to the acceptor or his solicitor to qualify the assent by special conditions (which is always a question of construction), then until those conditions are accepted, there is no final agreement, such as the Court will enforce (*p*). Thus, where the vendors of land, in a letter acknowledging the receipt of an offer to purchase, wrote as follows to the intending purchasers, "Which offer we accept, and now hand you two copies of conditions of sale which we have signed. We will thank you to sign same and return one of the copies to us," and the conditions were of a special character, which the purchasers refused to assent to, it was held that the acceptance was simply conditional, and a demurrer to the vendor's bill for specific performance was allowed (*q*). So, where an intending lessee, in reply to a letter from house-agents furnishing particulars and terms of

The most recent authorities lay down the proposition in the text in very clear terms. See in particular *Hussey* v. *Horne-Payne*, 4 Ap. Ca. 311; *May* v. *Thomson*, 20 Ch. D. 705; *Brien* v. *Swanson*, 1 L. R. Ir. 135; *Dyas* v. *Stafford*, 9 L. R. Ir. 520; *Eadie* v. *Addison*, 52 L. J. Ch. 80. These cases emphasise the rule that the whole correspondence must be looked at. "You must not at one particular time draw a line and say, 'We will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond.'" Per Lord Cairns, 4 Ap. Ca. 316.

(*o*) *Per* Sir G. Jessel, M. R. in *Crossley* v. *Maycock*, 18 Eq. 180, 181; and see judgment of Lord Westbury in *Chinnock* v. *Marchioness of Ely*, 4 D. J. & S. 645; *Bonnewell* v. *Jenkins*, 8 Ch. D. 70, and *Rossiter* v. *Miller*, 3 Ap. Ca. 1138, *Eadie* v. *Addison*, 52 L. J. Ch. 80. In *Moiser* v. *Wisher*, L. R. 6 C. P. 120, a case coming within this class, a contract containing unreasonable stipulations having been tendered to the purchaser, and the vendor having resold on the refusal of the purchaser to execute this contract, the latter was held to be entitled to recover his deposit.

(*p*) *Winn* v. *Bull*, 7 Ch. D. 32; *Hawkesworth* v. *Chaffey*, 54 L. T. 72.

(*q*) *Crossley* v. *Maycock*, 18 Eq. 180; *Bushell* v. *Pocock*, 53 L. T. 860; and see cases cited in note (*n*); and *Ridgway* v. *Wharton*, 6 H. L. C. 264, 288, 306.

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two residences, wrote, "I have decided on letting No. 22, Belgrave-road, and have spoken to my agent, Mr. C., of, &c., who will arrange matters with you, if you will put yourselves in communication with him;" it was held that there was no contract (*r*); so, where the agreement was to take a lease, "subject to the preparation and approval of a formal contract" (*s*).

A written offer may be accepted by parol.

An offer in writing may be accepted by parol, or by the acts of the other party; and if the proposal in writing is signed by the party to be charged, and there is a parol acceptance by the party to whom it is made, there is a sufficient memorandum within the 4th section of the Statute of Frauds (*t*).

Conditions of sale—whether impliedly incorporated in contract.

It has been held that conditions of sale used at the putting up of an estate by auction, cannot be considered as impliedly incorporated with an unconditional offer by letter to purchase the property, subsequently made by a person who attended the auction (*u*); but the case is different, for the purpose of defence in Equity, where the parol negotiation has proceeded upon the footing of the conditions (*x*).

Effect of conditional acceptance.

Where the defendant wrote at the foot of an agreement for an underlease, "I have no objection to this agreement supposing that there is nothing unusual in Sir R.'s (the ground landlord) leases, which I presume there is not;" and then, before the agreement with this variation had been

(*r*) *Stanley* v. *Doudeswell*, L. R. 10 C. P. 102.

(*s*) *Winn* v. *Bull*, 7 Ch. D. 29; *Hawkesworth* v. *Chaffey*, 54 L. T. 72, and see *Harvey* v. *Principal of Barnard's Inn*, 50 L. J. Ch. 750; and *Vale of Neath Colliery Co.* v. *Furness*, 45 L. J. Ch. 276. An agreement to purchase on "a formal contract" being signed by the purchaser "when prepared" by the vendor's solicitor, and "when approved" by the purchaser's solicitor, cannot be enforced unless the approval be withheld unreasonably and *mala fide*, *Bartlett* v. *Greene*, 30 L. T. 553, *Hudson* v. *Buck*, 7 Ch. D. 683.

(*t*) *Reuss* v. *Picksley*, L. R. 1 Ex. 342, and see *Warner* v. *Wellington*, 3 Dr. 523.

(*u*) *Cowley* v. *Watts*, 17 Jur. 172.

(*x*) See *Ogilvie* v. *Foljambe*, 3 Mer. 53.

acceded to by the other party, withdrew his offer; and it was contended that, inasmuch as the covenants were usual, he still remained bound; Sir J. Wigram, V.-C., admitting that a case might exist in which the distinction between the original and altered agreement must be treated as plainly nugatory, held, that the case before him could not be considered as of that character, merely because the Court might, upon argument, decide that the covenants were not unusual (*y*).

Approval of title by purchaser's solicitor.

In the recent case of *Hussey* v. *Horne-Payne* (*z*), it was held by the Court of Appeal, in accordance with the opinion expressed by Fry, J., in *Hudson* v. *Buck* (*a*), that a contract to purchase "subject to the approval of the title by the purchaser's solicitors," was conditional on such approval; but on appeal to the House of Lords, Lord Cairns was of a different opinion, although the case was not decided upon this point (*b*).

Offer may be withdrawn before acceptance.

For, it may be observed, that an original offer, or, it is conceived, any subsequent proposal which does not amount to a simple acceptance of the terms of the other party, may be withdrawn or varied (*c*) at any time before it is accepted; even although a time be named for its acceptance (*d*); and it is revoked by the death or bankruptcy of the proposer before acceptance (*e*); and that, if rejected, either by an express refusal, whether written or verbal (*f*), or a proposed variation

If rejected, &c., it ceases to be binding.

(*y*) *Lucas* v. *James*, 7 Ha. 410; *Warner* v. *Willington*, 3 Dr. 523, where the completion of the contract was subject to references being satisfactory; *Smith* v. *Neale*, 2 C. B. N. S. 67.

(*z*) 8 Ch. D. 670.

(*a*) 7 Ch. D. 683.

(*b*) 4 Ap. Ca. 311.

(*c*) *Honeyman* v. *Marryat*, 6 H. L. C. 112; *Chinnock* v. *Marchioness of Ely*, 4 D. G. J. & S. 645.

(*d*) *Routledge* v. *Grant*, 4 Bing. 653; *Martin* v. *Mitchell*, 2 J. & W. 428; *Lucas* v. *James*, 7 Ha. 410; *Dickinson* v. *Dodds*, 2 Ch. D. 463; see and distinguish *Branson* v. *Stammers*, 28 W. R. 180, where there was an unequivocal acceptance of the offer, accompanied by the appointment of a time for signing the contract.

(*e*) *Meynell* v. *Surtees*, 3 S. & G. 101.

(*f*) *Sheffield Canal Co.* v. *Sheffield R. Co.*, 3 R. C. 121; *Honeyman* v. *Marryat*, *supra*.

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Must be accepted within reasonable time.

either as to time for giving possession, or price, or payment of deposit, or it is conceived, in any other particular, it at once ceases to be binding (*g*): and the acceptance of an offer must be given within a reasonable time (*h*): if, however, a person make an offer by post, he cannot retract it, if the other party, before receiving any notice of withdrawal, return an immediate acceptance (*i*). But formal notice of withdrawal is not necessary; it is sufficient if the person to whom it is made has actual knowledge that the person who made it has done some act inconsistent with the continuance of the offer, such as selling the property to a third person (*k*).

Parol evidence admissible to prove that the agreement was conditional.

Although where an agreement is signed *animo contrahendi*, parol evidence is not admissible to vary its terms, yet such evidence may be admitted to show that the signature was merely conditional, and that the agreement was intended to operate only on the happening of certain contingencies (*l*).

Memorandum binds, although sent as instructions for formal agreement.

A writing which is signed by either party, and is perfect as respects the terms of the contract, will not be considered otherwise than final from the mere fact of its having, with the consent of the other party, been sent to a solicitor as instructions for the preparation of a more formal instrument (*m*).

(*g*) *Routledge* v. *Grant*, 4 Bing. 653; *Hyde* v. *Wrench*, 3 B. 334; *Thornbury* v. *Bevil*, 1 Y. & C. C. C. 554.

(*h*) *Kennedy* v. *Lee*, 3 Mer. 454; *Thornbury* v. *Bevil*, 1 Y. & C. C. C. 554, 563; *Williams* v. *Williams*, 17 B. 213; and see *Powers* v. *Fowler*, 4 E. & B. 519; *Meynell* v. *Surtees*, 3 S. & G. 101.

(*i*) See *Dunlop* v. *Higgins*, 1 H. L. C. 400; *Potter* v. *Sanders*, 6 Ha. 1; *Household Accident Co.* v. *Grant*, 4 Ex. D. 216; as to offer by telegram, see *Quenerduane* v. *Cole*, 32 W. R. 185.

(*k*) *Dickinson* v. *Dodds*, 2 Ch. D. 463; and cf. *Stevenson* v. *McLean*, 5 Q. B. D. 346; *Byrne* v. *Van Tienhoven & Co.*, 5 C. P. D. 344.

(*l*) *Pym* v. *Campbell*, 6 E. & B. 370; *Wake* v. *Harrop*, 7 Jur. N. S. 710.

(*m*) *Fowle* v. *Freeman*, 9 V. 354; *Morgan* v. *Holford*, 1 S. & G. 101. See *Gibbins* v. *N. E. Metr. Asylum*, 11 B. 1; *Card* v. *Jaffray*, 2 Sch. & L. 374; and see judgment in *Crossley* v. *Maycock*, 18 Eq. 180; *Ridguay* v. *Wharton*, 6 H. L. C. 238, 264, 288, 306.

Clerical error.

Any error, obviously clerical, in an agreement, will be corrected by the Courts (*u*).

Section 4.

(4.) *As to the signature.*

As to the signature.

Signature by party charged sufficient.

Other party must elect.

It has been long settled that a party signing an agreement is *primâ facie* bound by it, although it be not signed by the other party (*o*); but if only one be bound, he may, it would appear, require the other to signify in writing his assent to or dissent from the contract; and unless this be acceded to, he may himself rescind it (*p*); and evidence is admissible to show that an agent intended to sign in his own right as well as on behalf of his principal, provided that it does not actually contradict the document (*q*).

What signature sufficient.

A signature printed, or stamped, instead of written, or by initials, may be binding (*r*); but a mere description, although it satisfactorily identify the party, *e.g.*, "your affectionate mother," subscribed to a letter addressed to the son, with his name and address in full, has been held insufficient (*s*).

Signature to instructions for telegram.

In a late case, where there was a written offer to purchase, to which the vendor replied by telegram "your offer for the L. estate is accepted," it was considered by the Court, though it was not necessary to decide the point, that the signature of the vendor to the instructions for the telegram was a sufficient signature within the statute (*t*).

(*u*) See *Wilson* v. *Wilson*, 5 H. L. C. 40; *Hart* v. *Tulk*, 2 D. M. & G. 300.

(*o*) *Seton* v. *Slade*, 7 V. 265; 2 Wh. & T. L. C.; *Field* v. *Boland*, 1 D. & Wal. 37; Sug. 129; *Laythoarp* v. *Bryant*, 2 Bing. N. C. 735; *Fowle* v. *Freeman*, 9 V. 354; *Weston* v. *Russell*, 3 V. & B. 187, 192; *Owen* v. *Thomas*, 3 M. & K. 353.

(*p*) *Martin* v. *Mitchell*, 2 J. & W. 428; see *Lord Ormond* v. *Anderson*, 2 B. & B. 371; and *Williams* v. *Williams*, 17 B. 213, 216.

(*q*) *Young* v. *Schuler*, 11 Q. B. D. 651.

(*r*) *Saunderson* v. *Jackson*, 2 B. & P. 238; *Schneider* v. *Norris*, 2 M. & S. 286; *Phillimore* v. *Barry*, 1 Camp. 513; *Sweet* v. *Lee*, 3 Man. & G. 452; and see *Blore* v. *Sutton*, 3 Mer. 245; *Tourret* v. *Cripps*, 48 L. J. Ch. 567.

(*s*) *Selby* v. *Selby*, 3 Mer. 2; and see *Shelton* v. *Cole*, 1 D. & J. 587.

(*t*) *Godwin* v. *Francis*, L. R. 5 C. P. 295.

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In pencil.

And it appears that an agreement is not the less binding by reason of the alterations and signature being in pencil instead of ink (*u*).

Signature by agent.

And a signature in the name of an agent will bind the principal if the agency be established (*x*); and the alleged agent might, even before the Evidence Act (*y*), be examined either to prove (*z*) or disprove the agency; but if his evidence go to impeach the validity of the authority under which he has professed to act, it will be received with the most anxious jealousy (*a*).

Signature not necessarily placed at end of agreement.

The signature to formal agreements, is of course usually found at the end of the document; but the statute requires only a *signing* and not a *subscribing;* and the signature may, as in the case of a letter or agreement in the third person, be inserted in the beginning or any other part of the instrument, if inserted so as, in effect, to authenticate the entire document, and not to be exclusively applicable to particular portions (*b*); or, in other words, if it be so placed as to show that it was intended to relate to, and that it does in fact relate to, every part of the instrument (*c*); and this according to some authorities, although, in the case of an agreement in the third person, a place be left for signature at the bottom, in the usual way (*d*): however, in a case, where the agreement contained the names of the parties in the commencement, and concluded with the words, "as witness our hands," without being followed by any name or signature, the Court took

Effect of leaving blank for signature.

(*u*) *Lucas* v. *James*, 7 Ha. 410; *Geary* v. *Physic*, 5 B. & C. 234.

(*x*) *White* v. *Proctor*, 4 Taun. 209; *Kenworthy* v. *Schofield*, 2 B. & C. 945.

(*y*) 14 & 15 V. c. 99.

(*z*) See *Marston* v. *Roe*, 8 A. & E. 30; and *Long* v. *Millar*, 4 C. P. D. 450.

(*a*) *Howard* v. *Braithwaite*, 1 V. & B. 202, 209.

(*b*) *Saunderson* v. *Jackson*, 2 B. & P. 238; *Morison* v. *Turnour*, 18 V. 175; *Western* v. *Russell*, 3 V. & B. 187; *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Propert* v. *Parker*, 1 R. & M. 625; *Bleakley* v. *Smith*, 11 Si. 150; *Lobb* v. *Stanley*, 5 Q. B. 574; *Stokes* v. *Moore*, 1 Cox, 219; Sug. 135.

(*c*) Per Lord Westbury, in *Caton* v. *Caton*, 2 H. L. 143.

(*d*) *Saunderson* v. *Jackson*, 2 B. & P. 239.

Where the name is inserted in the body of the agreement.

a more common-sense view of the question, and held that there was no sufficient signature (*e*); so, where A., intending to marry B., wrote a paper commencing thus, "In the event of a marriage between the undermentioned parties, the following conditions, as a basis for a marriage settlement, are mutually agreed upon;" and then followed the terms of a proposed settlement, but the name of neither party was signed to the memorandum, it was rightly held that A.'s name, occurring in particular portions of the instrument, could not, by force of the words "undermentioned parties" be fastened on to the introductory words, so as to constitute a sufficient signature (*f*). The purchaser's signature on the back of the printed particulars (*g*), or in a column left blank in them for that purpose, may be sufficient (*h*).

Party bound by signature as witness:

but not as attesting witness.

And although a principal or his agent sign merely as a witness, he may be bound, if the signature amount to an acknowledgment of the existence of the agreement; *e.g.*, "witness A. B." (*i*): but where a person, whose formal signature would have bound the vendor, merely attested the execution of the agreement by the purchaser, this was held to be insufficient (*k*). The question whether a person has signed his name, and if so for what purpose, is one of evidence, and any evidence which does not contradict the document is admissible (*l*).

Approval of draft agreement or

The written approval by a professional agent, of a draft agreement, or of the draft conveyance which recites the agree-

(*e*) *Hubert* v. *Treherne*, 3 Man. & G. 743; *Hubert* v. *Turner*, 4 Sc. N. R. 486; cf. *R.* v. *Tart*, 28 L. J. Q. B. 173.

(*f*) *Caton* v. *Caton*, L. R. 2 H. L. 127.

(*g*) See and consider *Hodgson* v. *Le Bret*, 1 Camp. 233; *Phillimore* v. *Barry*, *ibid.* 518; and as to bought and sold goods, *Goom* v. *Aflalo*, 6 B. & C. 117; and *Sivewright* v. *Archibald*, 17 Q. B. 124, where the earlier cases are reviewed.

(*h*) *Emmerson* v. *Heelis*, 2 Taun. 38.

(*i*) *Welford* v. *Beazley*, 3 Atk. 504; *Coles* v. *Trecothick*, 9 V. 234, 251; see *Symons* v. *Symons*, 6 Mad. 207.

(*k*) *Gosbell* v. *Archer*, 2 A. & E. 500. As to whether attesting the execution of a deed is itself notice, see Sug. 780, 781.

(*l*) *Young* v. *Schuler*, 11 Q. B. D. 651; *Dyas* v. *Stafford*, 9 L. R. Ir. 520; *Smith* v. *Webster*, 3 Ch. D. 49.

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conveyance, whether sufficient.

ment, will, it would seem, be insufficient (*m*), the signing being *alio intuitu;* this, however, was much questioned in another case (*n*), which was eventually decided on a collateral point: but in a later case, the written approval of the draft conveyance by the professional agent, was held insufficient, there being no proof that he had his client's authority to sign an agreement (*o*): the effect of a similar approval of a draft agreement by one of the parties, is more doubtful (*p*): it was held sufficient in a modern case, in which, however, the earlier authorities do not appear to have been cited (*q*). The circumstance of the party signing such approval being in the legal profession would, it is conceived, be unfavourable to the sufficiency of the signature. The alteration of the draft conveyance by one of the parties has been held insufficient: upon the case (*r*) as reported, it does not appear that the alterations comprised the name of the party making them; and the only ground for contending for the sufficiency of the instrument would be, that, by making the alteration, he had adopted such part of the draft, including the name, as he had left unaltered. In *Ithel* v. *Potter* (*s*), there was a similar decision, where the entire conveyance had been written by the defendant; but it does not appear whether the conveyance recited the agreement, although such, probably, was the case. Where the draft of a lease had, in pursuance of a parol agreement, been forwarded to the intended lessee for perusal, and he indorsed and signed a memorandum upon it, requesting the lessor to endeavour to relet the premises, as it would be inconvenient for him (the lessee) to perform his agreement, this was held to be sufficient (*t*).

(*m*) See Sug 140; *Lady Thynne* v. *Earl of Glengall*, 2 H. L. C. 131; *Lord Townshend* v. *Bishop of Norwich*, 1 Rop. H. & W. 308, n.; *Jackson* v. *Oglander*, 2 H. & M. 472, *Smith* v. *Webster*, *suprà*.

(*n*) *Thornbury* v. *Bevill*, 1 Y. & C. C. C. 554; and see *Card* v. *Jaffray*, 2 Sch. & L. 374.

(*o*) *Forster* v. *Rowland*, 7 H. & N. 103.

(*p*) See Sug. 141; *Doe* v. *Pedgriph*, 4 C. & P. 312; *Parker* v. *Smith*, 1 Coll. 608; and compare *Shippey* v. *Derrison*, 5 Esp. 190.

(*q*) *Foligno* v. *Martin*, 16 B. 586.

(*r*) *Hawkins* v. *Holmes*, 1 P. W. 770, see *Stokes* v. *Moore*, 1 Cox, 219.

(*s*) 1 P. Wms. 771.

(*t*) *Shippey* v. *Derrison*, 5 Esp. 190, and see *Craig* v. *Elliott*, 15 L. R. Ir. 257, where there was a letter complaining of delay in engrossing the draft conveyance.

Signature by public companies, &c.

A contract by a corporation aggregate must, as a general rule (*u*), be under their common seal (*x*): but, by the Companies Clauses Consolidation Act, 1845, any contract entered into on behalf of a company coming within the provisions of the Act, and which, if made between private persons, would require to be in writing, and to be signed by the parties to be charged therewith, may be made, varied, or discharged in writing, signed by any two of the directors (*y*): and the same rules which apply to an original contract apply to any variation or alteration of it (*z*). In cases which fall within the general rule, the omission of the common seal precludes the company, while the contract is still executory, from suing, as it relieves them from being sued, upon it (*a*). In one case (*b*), it was held that where the unsealed contract is of such a nature as to be specifically enforceable in Equity, and there has been part performance under circumstances which render the equitable doctrine of part performance applicable, specific performance may be enforced against the corporation. But this principle, though subsequently recognized by the Court below in *Hunt* v. *The Wimbledon Local Board* (*c*), was doubted in the Court of Appeal (*d*); and it is conceived not

(*u*) The exceptions to the rule are, in the case of corporations *generally*, contracts of trivial importance, of great urgency, and of constant recurrence; see *Henderson* v. *Australian R. M. S. N. Co.*, 5 E. & B. 409; *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 815; *Wells* v. *Kingston-upon-Hull*, L. R. 10 C. P. 402: and in the case of *trading* corporations, contracts entered into by such corporations for effecting the purposes for which such corporations were incorporated; see *Beverley* v. *Lincoln Gas Co.*, 6 A. & E. 829; *South of Ireland Colliery Co.* v. *Waddle*, L. R. 4 C. P. 617; *Hunt* v. *Wimbledon Local Board*, 4 C. P. D. 48. See also *Young* v. *Mayor of Leamington*, 8 Ap. Ca. 517.

(*x*) See *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 815; *Cope* v. *Thames Haven Co.*, 3 Ex. 841; *Diggle* v. *London and Blackwall R. Co.*, 5 Ex. 442; *Homersham* v. *Wolverhampton Waterworks Co.*, 6 Ex. 137; *Jackson* v. *N. W. R. Co.*, 1 H. & Tw. 75; *Mayor of Kidderminster* v. *Hardwick*, L. R. 9 Ex. 13; *Austin* v. *Guardians of Bethnal Green*, L. R. 9 C. P. 91.

(*y*) 8 V. c. 16, s. 97; see *Lowe* v. *L. & N. W. R. Co.*, 18 Q. B. 632. See 19 & 20 V. c. 47, s. 41; and see now as to companies under the Companies Act, 1867, 30 & 31 V. c. 131, s. 37; and *vide ante*, p. 219.

(*z*) *Williams* v. *Chester R. Co.*, 15 Jur. 828.

(*a*) *Governor of Copper Miners* v. *Fox*, 16 Q. B. 229.

(*b*) *Crook* v. *Corp. of Seaford*, 6 Ch. 551; and see *post*, p. 1139.

(*c*) 3 C. P. D. 208, 214.

(*d*) 4 C. P. D. 48.

without reason; for the doctrine of part performance only allows evidence to be given of what the contract between the parties was, and does not apply where there is no contract, or a contract which is an absolute nullity (*e*). Apparently, a contract under seal will, in a proper case, be presumed when the consideration is executed, for it has been held that a corporation may be made liable at law for use and occupation (*f*). It would seem to follow from this that even where there is an express contract which is a nullity for want of a seal, and the corporation have taken a benefit under it, they may be made liable on any contract which the law will imply. Where the validity of the contract depends upon whether a formality of internal management (*e. g.*, the passing of a resolution) has been complied with, a stranger dealing with the corporation has a right to assume such compliance (*g*). But this doctrine clearly applies only where the transaction, though it may be *ultra vires* the directors or agent, is *intra vires* the corporation.

Alteration or correction of agreement.

We may here observe, that any alteration made by either party in a material part of a written contract, without the consent of the other party, destroys the rights under the contract of the party making the alteration (*h*): but an alteration made with consent is binding; and although it is prudent and usual to authenticate the alterations by a marginal signature, either in full name or by initials, this precaution seems to be not absolutely necessary: in fact, it has been held that a memorandum written across the face of the signed agreement, and correcting an error in one of its terms, binds the writer although he do not sign

(*e*) See *Britain* v. *Rossiter*, 11 Q. B. D. 123, 132. And see *ante*, p. 232, n. (*l*); and *post*, p. 1138.

(*f*) *Finlay* v. *B. & E. R. Co.*, 21 L. J. Ex. 117; *Lowe* v. *L. & N. W. R. Co.*, 18 Q. B. 632.

(*g*) *Royal British Bank* v. *Turquand*, 6 E. & B. 327, *Mahony* v. *East Holyford Co.*, L. R. 7 H. L. 869.

(*h*) *Powell* v. *Divett*, 15 Ea. 29; *Davidson* v. *Cooper*, 13 M. & W. 343; *Mollett* v. *Wackerbarth*, 5 C. B. 181; as to the effect of filling up the blanks in a deed after execution by one of the parties, see *Adsetts* v. *Hives*, 33 B. 52. As to the admissibility of such an altered contract to show what the terms were, see *Earl of Falmouth* v. *Roberts*, 9 M. & W. 469; *Pattinson* v. *Luckley*, L. R. 10 Ex. 330.

it; and that the agreement thus corrected is valid under the Statute of Frauds (*i*).

Section 5.

(5.) *As to the stamps.*

As to the stamps.

As to stamps on agreements.

The agreement, if under seal, is a deed, and chargeable with duty as such (*k*); if not under seal, and if the subject-matter do not appear to be of the value of £5 (*l*), no duty is payable; and if, on a sale by auction, the same person buy several lots, a distinct contract arises for each lot; and whatever may be the aggregate amount, no stamp is required for any lot which separately sells for less than £5 (*m*). Supposing the purchase-money to exceed £5, a 6*d.* stamp only is payable (*n*); this may, without payment of a penalty, be affixed within fourteen days after execution; after that time a £10 penalty becomes payable (*o*). The duty may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed (*p*).

Cases of exemption.

A contract by the trustee of a bankrupt for the sale of his real estate, is exempt from stamp duty (*q*); as, also, are agreements under the Acts for promoting the residences of the Parochial Clergy, the Church Building, Poor Law, Tithe Commutation, and Commons Inclosure Acts, and agreements entered into by the Commissioners of Woods and Forests (*r*). Whether a receipt for purchase-money, unless duly stamped as such, is admissible as evidence of the contract, has been the subject of conflicting decisions (*s*).

Several stamps when requisite.

There must, in general, be distinct stamps for each distinct agreement or contract; upon this principle, where a person

(*i*) *Bluck* v. *Gompertz*, 7 Ex. 862.

(*k*) See *Robinson* v. *Drybrough*, 6 T. R. 317.

(*l*) See *Liddiard* v. *Gale*, 4 Ex. 816, and 33 & 34 V. c. 97, Sched.

(*m*) *Emmerson* v. *Heelis*, 2 Taun. 38, *Roots* v. *Lord Dormer*, 4 B. & Ad. 77, see, as to goods, *Bigg* v. *Whisking*, 14 C. B. 195.

(*n*) 33 & 34 V. c. 97; cf. 23 V. c. 15, under which there was a further progressive duty for every entire quantity of 1,080 words above the first 2,160.

(*o*) See 33 & 34 V. c. 97, s. 15.

(*p*) *Ibid.* s. 36.

(*q*) 46 & 47 V. c. 52, s. 144.

(*r*) See Tilsley, 531 *et seq.*

(*s*) *Evans* v. *Prothero*, 2 M. & G. 319; *S. C.*, *contrà*, 1 D. M. & G. 572, and see and consider *Diplock* v. *Hammond*, 5 D. M. & G. 320.

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purchases several lots at an auction, the agreement must bear a stamp in respect of each lot for which the purchase-money exceeds £5 (*t*). Upon a purchase from persons having separate interests in an estate (*e. g.*, tenants in common, or tenant for life and remainderman), the agreement, if so worded as to be a contract for the entire estate, would seem to be subject only to single duty; but if, on the contrary, it were so worded as to amount to separate contracts with the several vendors for their separate interests in the property, so as to give to each vendor a right to enforce the agreement in respect of his own particular interest, it is conceived that separate stamps would be requisite.

Loss of unstamped agreement, effect of.

If the agreement be not stamped, and be subsequently lost, or even destroyed by the fraudulent act of the party chargeable thereon, a Court of Equity can give no relief unless the plaintiff can procure a copy; the defendant, if he have a copy, will be ordered to produce it for the purpose of its being stamped (*u*); and it appears that a copy may be made from recollection, if the witnesses can swear to the precise terms, and not merely the general tenor of the instrument (*x*): and the Courts will, in the absence of circumstances inducing a supposition to the contrary, presume that a lost instrument was duly stamped (*y*); or that obliterated stamps were of the right amount (*z*): and they have now power (*a*) to admit unstamped or insufficiently stamped instruments in evidence upon payment in Court of the deficient stamp duty, a penalty of £10, and a further sum of £1. And if the agreement is admitted by the answer, the want of a stamp is immaterial (*b*).

(*t*) See *James* v. *Shore*, 1 Stark. 426, *Watling* v. *Horwood*, 12 Jur. 48. But a lease is not subject to an agreement stamp, in respect of it reserving an option of purchase to the lessee; *Worthington* v. *Warrington*, 5 C. B. 635.

(*u*) See *Fowle* v. *Freeman*, Sug. 144; *Bousfield* v. *Godfrey*, 5 Bing. 418; *Blair* v. *Ormond*, 1 De G. & S. 428.

(*x*) *Smith* v. *Henley*, 1 Ph. 391.

(*y*) See cases referred to in last two notes, and *Hart* v. *Hart*, 1 Ha. 1; *Crowther* v. *Solomons*, 6 C. B. 758; *Closmadeuc* v. *Carrel*, 18 C. B. 36; and see *post*, p. 370.

(*z*) *Doe* v. *Coombs*, 6 Jur. 930.

(*a*) 33 & 34 V. c. 97, s. 16.

(*b*) *Huddleston* v. *Briscoe*, 11 V. 583.

Instrument recording transfer of property is liable to duty as a conveyance.

It has been held by the Court of Exchequer, that any instrument operating as a record of the transfer of property (not being goods, wares, or merchandise), *e. g.*, a memorandum that A. *has sold* all the goods and *fixtures* in a certain shop, is a conveyance within the meaning of the Stamp Laws, and must bear the *ad valorem* duty (*c*).

Agreement in evasion of the Stamp Laws void.

We may here remark, that an agreement in evasion of the Stamp Laws, *e. g.*, that the document shall, for the present, remain unstamped, but that, if it shall become necessary to stamp it, one of the parties thereto will pay the penalty, cannot be enforced (*d*).

Section 6.

(6.) *As to illegal agreements.*

Agreement for any illegal purpose void.

As a general rule, no agreement can be enforced, at Law or in Equity, which is entered into for an illegal purpose (*e*); or has a tendency to promote an unlawful act (*f*); or is contrary to the policy of the law; as *e. g.*, where an antenuptial settlement contemplates a future separation of husband and wife (*g*): and if the illegal agreement is to be performed in this country, it is immaterial that it was entered into in a country where it would have been considered valid (*h*). And there are certain agreements which the Legislature has pronounced to be, in their own nature, illegal. The Statute of 32 Henry VIII. (*i*), declares it to be unlawful to buy or sell any pretended right or title to any lands or hereditaments, unless the vendors or their ancestors, or the persons through whom the claim is derived, have been in possession of the property, or of the reversion or remainder thereof, or taken the rents or profits thereof, within a year before the sale; but the purchase of a pretended title,

Sale of pretended title.

(*c*) *Horsfall* v. *Hey*, 2 Ex. 778. But see as to real estate, *Wilmot* v. *Wilkinson*, 6 B & C. 506, *Toll* v. *Lee*, 4 Ex. 230.

(*d*) *Abbott* v. *Stratten*, 3 J. & L. 616.

(*e*) *Vide post*, pp. 1096, 1162 *et seq.*

(*f*) *Egerton* v. *Lord Brownlow*, 4 H. L. C. 1, and see *Hilton* v. *Eckersley*, 6 E. & B. 47.

(*g*) *H.* v. *W.*, 3 K. & J. 382.

(*h*) *Grell* v. *Levy*, 10 Jur. N. S. 210.

(*i*) C. 9, see s. 2, and *Partridge* v. *Strange*, Plow. 77, 88; *Jenkins* v. *Jones*, 9 Q. B. D. 128; *Kennedy* v. *Lyell*, 15 Q. B. D. 491.

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To what the statute extends.

by a person in lawful possession of the rents and profits, is allowable (*k*). In a modern case, where A., possessed of a term of years, died in 1828, and strangers entered and occupied until 1841, when A.'s next of kin took out letters of administration and sold and assigned the term, the assignment was held to be clearly void (*l*): so, the Act extends to a lease under a pretended title (*m*); and to the assignment of the mere right to bring an action to set aside a previous voidable conveyance (*n*); and to the purchase of an estate for the purpose of acquiring the right to impeach some previous arrangement affecting the property (*o*); and to an agreement that the attorney shall, in lieu of costs, have a share of the estate recovered for his client (*p*); and *à fortiori*, to an agreement that, in addition to his legal costs, he shall have a definite portion of the estate; or a sum proportionate to the value recovered (*q*); and it would seem that any absolute purchase by the attorney of the subject-matter of the suit *pendente lite* is unlawful, and void (*r*); but he may take security for his costs on the subject-matter of the action (*s*).

To what it does not extend.

The Act, however, does not extend to an assignment of a purchaser's interest under the agreement for sale (*t*); nor to

(*k*) See sect. 4. Since the 8 & 9 V. c. 108, a right or title good in fact is not a "pretenced" title merely because it is a right of entry; *Jenkins* v. *Jones*, 9 Q. B. D. 128; and the onus is now upon the plaintiff to show, not only that the title was bad, but also that the purchaser knew it to be "pretenced," *i. e.*, fictitious; and this onus is not discharged by showing merely that the right purchased was in fact barred by the Statute of Limitations at the date of the contract; *Kennedy* v. *Lyell*, 15 Q. B. D. 491.

(*l*) *Doe* d. *Williams* v. *Evans*, 1 C. B. 717; *Marquis Cholmondely* v. *Lord Clinton*, 2 J. & W. 135; and see *Wood* v. *Downes*, 18 V. 125; *Burke* v. *Greene*, 2 B. & B. 517; *Moore* v. *Creed*, 1 D. & Wal. 521; *Robb* v. *Dorrian*, 11 I. R. C. L. 292.

(*m*) *Hitchins* v. *Lander*, G. Coop. 34.

(*n*) *Prosser* v. *Edmonds*, 1 Y. & C. 481; *Keogh* v. *M'Grath*, 5 L. R. Ir. 478. The rule does not apply to a trustee in bankruptcy, who may dispose of a right of action belonging to the bankrupt, even though the latter could not himself have so dealt with it; *Stear* v. *Lauson*, 15 Ch. D. 426.

(*o*) *De Hoghton* v. *Money*, 2 Ch. 164.

(*p*) *Thomas* v. *Lloyd*, 3 Jur. N. S. 288; see 33 & 34 V. c. 28.

(*q*) *Earle* v. *Hopwood*, 7 Jur. N. S. 775.

(*r*) *Simpson* v. *Lamb*, 7 E. & B. 84.

(*s*) *Simpson* v. *Lamb*, *ubi suprà*; and see *Wood* v. *Downes*, 18 V. 120.

(*t*) *Wood* v. *Griffith*, 1 Sw. 56; Sug. 356; and see 8 & 9 V. c. 106, s. 6.

an agreement to sell an estate in the event of the party becoming seised of it under the will of the living owner (*u*); nor to an assignment of the subject-matter of an action (*x*), even though the assignees be mere volunteers (*y*); nor to a security on the subject-matter of a suit (*z*). It has, however, been held that where the assignment contains an indemnity from the purchaser to the vendor against the costs incurred, or to be incurred, in the suit, the transaction savours of champerty (*a*); but this distinction has not been lately followed; thus, where annuities were sold pending a suit which related to them, and the vendors took an indemnity against past and future costs, it was held that the sale was not affected by the laws relating to champerty (*b*). Nor does the Act apply if the purchaser have a previous common interest in the event of the action; as in the case of a purchase, by a second mortgagee, of the interest of the first mortgagee, during an action in which the mortgaged property is claimed under a paramount title (*c*); nor where parties, having a common interest, enter into an arrangement respecting the litigation for securing it (*d*); nor where the agreement contains no stipulation for the commencement of a suit, and no suit is pending (*e*); nor to an agreement to enable the purchaser of an estate to recover for rent due, or injury done to the property prior to the purchase (*f*); nor to a conveyance to a reversioner or remainderman, with a view to strengthen his estate (*g*); nor to cases where the right purchased is originally clear, but the litigation results from circumstances subsequently arising or subsequently known (*h*); and the nature of reversions

(*u*) *Cook* v. *Field*, 15 Q. B. 460.

(*x*) *Harrington* v. *Long*, 2 M. & K. 590; see *Martyn* v. *Macnamara*, 2 Con. & L. 541; *Scully* v. *Delany*, 2 Ir. Eq. R. 379; *Cockell* v. *Taylor*, 15 B. 117.

(*y*) *Dickinson* v. *Burrell*, 1 Eq. 337; but see comments on this case in *Robb* v. *Dorrian*, 11 I. R. C. L. 292; and *Keogh* v. *M'Grath*, 5 L. R. Ir. 516.

(*z*) *Anderson* v. *Radcliffe*, E. B. & E. 806, 819.

(*a*) *Harrington* v. *Long*, 2 M. & K. 590; but see Sir Jas. Wigram's comments on this case, 4 Ha. 430.

(*b*) *Knight* v. *Bowyer*, 2 D. & J. 421.

(*c*) *Hunter* v. *Daniel*, 4 Ha. 420.

(*d*) *Bambrigge* v. *Moss*, 3 Jur. N. S. 58.

(*e*) *Sprye* v. *Porter*, 7 E. & B. 58.

(*f*) Sug. 357; *Williams* v. *Protheroe*, 5 Bing. 309; *S. C.*, 3 Y. & J. 129.

(*g*) Co. Litt. 369 b; see *Anson* v. *Lee*, 4 Si. 364.

(*h*) *Wilson* v. *Short*, 6 Ha. 366.

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necessarily excludes them from the direct operation of the Act of Henry VIII.: but an agreement in respect to a reversion may be so framed as to be impeachable as savouring of champerty (*i*). A plaintiff, who has an original title not founded on champerty, is not disqualified to sustain the suit by reason of his having made an improper bargain with his solicitor as to the mode of his remuneration (*k*).

Splitting votes for electioneering purposes

By the Act of the 7 & 8 Will. III. c. 25, s. 7, it is declared that all conveyances made of any hereditaments, in order to multiply voices, or to split and divide the interest in any houses or lands among several persons, to enable them to vote at elections of members to serve in Parliament, are void and of none effect; and, by a later Act (*l*), such conveyances, although containing conditions or stipulations of defeasance, are declared to be free and absolute. It appears, however, from recent decisions, that a conveyance made to carry into effect a real *bonâ fide* contract for sale, where the purchase-money is paid and possession taken without any secret reservation or trust for the benefit of the seller, is not within the statutes, although it be made with a view to the multiplying of voices, or to the splitting of the freehold: the intention of the statutes being, to avoid such conveyances only, made with that view, as are in themselves fraudulent and collusive (*m*); and that the statutes only affect the Parliamentary Law, and do not prevent the estate from passing (*n*).

Selling an advowson.

The right to sell an advowson, with the next presentation as part thereof, or a next presentation alone, subsists so long as there is an incumbent; nor will his known imminent danger, and his death within a few hours after completion of

(*i*) See *Reynell* v. *Sprye*, 1 D. M. & G 660, and cases there cited.

(*k*) *Hilton* v. *Woods*, 4 Eq. 432. As to what constitutes common barratry and maintenance, see *Scott* v. *Miller*, John. 221, and as to the remuneration of solicitors, see now 33 & 34 V. c 28.

(*l*) See 10 Anne, c. 31 (Ruff c 23); 1 Rogers on Elections, 14th ed. 142 *et seq.*

(*m*) *Riley* v. *Crossley*, 2 C. B. 146; *Alexander* v. *Newman*, *ibid.* 122; *Thornley* v. *Aspland*, *ibid.* 160; *Newton* v. *Hargreaves*, *ibid.* 163.

(*n*) *Phillpotts* v. *Phillpotts*, 10 C. B. 85.

the purchase, avoid the transaction as simoniacal, if the parties had no particular clerk in view (*o*): so, a stipulation by a vendor, who is not the incumbent, that he will pay interest on the purchase-money to the purchaser until the living becomes vacant, does not make the contract simoniacal, if there is no undertaking to procure an avoidance (*p*): so, a stipulation, on an exchange of benefices, that dilapidations shall not be made good, is not simony (*q*). When the church is void the right of immediate presentation cannot be sold either alone or as part of the advowson; and the purchase of a next presentation by a clerk, with a view to present himself, is prohibited by statute as simoniacal (*r*). This enactment is not found in practice to prevent purchases of entire advowsons by clergymen, with the view to present themselves upon the next vacancies; but the terms of the Act, and of the oath against simony, generally suggest greater difficulties to the mind of the conveyancer than to that of the clerical casuist.

Contingent interests, &c.

Under a modern Act (*s*), a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements, or hereditaments of any tenure, whether the object of the gift, or limitation of such interest or possibility, be or be not ascertained; also, a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England of any tenure, may be disposed of by deed, and may, of course, be contracted for. It seems that the words "right of entry," do not comprise a right of entry for condition broken; but only a right of entry in the nature of an estate or interest; *i.e.*, where a person by lapse of time has lost everything except

(*o*) *Fox* v. *Bishop of Chester*, 3 Bli. N. S. 123.

(*p*) *Sweet* v. *Meredith*, 3 Gif. 610.

(*q*) *Goldham* v. *Edwards*, 16 C. B. 437; 17 C. B. 141; 18 C. B. 389. The Ecclesiastical Dilapidations Act (34 & 35 Vict. c. 43) has not altered the law upon this point; *Wright* v. *Davies*, 1 C. P. D. 638.

(*r*) See 13 Anne, c. 11 (Ruff. 12 Anne, st. 2, c. 12). The purchase of an estate for life in an advowson has been held not to be the purchase of the "next presentation" within the meaning of the statute; *Walsh* v. *Bishop of Lincoln*, L. R. 10 C. P. 518.

(*s*) 8 & 9 V. c. 106, s. 6, which takes effect from the 1st Oct. 1845.

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the right to enter; at any rate, the former kind of right will not pass under an assurance unless expressly named (*t*).

Contracts by joint-stock companies before complete registration.

The 7 & 8 Vict. c. 110, s. 23, rendered absolutely illegal and void (*u*) contracts for purchase entered into by the promoters of joint-stock companies prior to complete registration, unless made conditional only, and to take effect on complete registration.

Contracts by mortgagee with mortgagor.

A mortgagee cannot, in Equity, contract with the mortgagor, at the time of the loan, for the absolute purchase of the land at a specific sum, in case of default being made in payment of the mortgage money at the appointed time (*x*); but this rule does not interfere with a purchase of the equity of redemption by the mortgagee as a distinct and subsequent transaction; nor does it preclude an agreement by the mortgagor, at the time of the loan, to give the mortgagee a right of pre-emption in case of a sale during the continuance of the security (*y*).

(*t*) *Hunt* v. *Bishop*, 8 Ex. 675; *Hunt* v. *Remnant*, 9 Ex. 635; as to rights of re-entry, see *Crane* v. *Batten*, 23 L. T. O S. 220. See the explanation of this point by Jessel, M R, in *Jenkins* v. *Jones*, 9 Q B. D. 131; *Kennedy* v. *Lyell*, 15 Q. B. D. 491; and Conv. Act, 1881, s 10.

(*u*) *Bull* v *Chapman*, 8 Ex. 444. See now as to how far a company may be bound by the acts of its promoters, Companies Act, 1867, 30 & 31 V. c. 131, s. 38; Buckley, 504 *et seq.*

(*x*) Coote Mortg. 19; *Jennings* v. *Ward*, 2 Vern. 520; *Willett* v. *Winnell*, 1 Vern. 488. The result of these cases is, that any agreement which "clogs the equity of redemption" is void.

(*y*) Coote Mortg. 20; Fisher, 687.

CHAPTER VII.

AS TO THE EFFECT OF THE CONTRACT ON THE RIGHTS OF THE PARTIES.

1. *Purchaser entitled to estate, and vendor to purchase-money.*

2. *Purchaser's general rights under contract as against vendor.*

3. *Vendor's general rights under contract as against purchaser.*

4. *Rights of vendor and purchaser,* inter se, *not affected by death, bankruptcy, &c., of either party.*

5. *Death of vendor before completion,—its effect on relative rights of his real and personal representatives, under old, and under new law.*

6. *Death of purchaser before completion,—its effect on relative rights of his real and personal representatives, under old, and under new law.*

7. *Effect of contract in various special cases.*

Section 1.

Vendor, how far a trustee for purchaser.

(1.) FROM the time of the owner of an estate having entered into a binding agreement for its sale, he holds the same in trust for the purchaser, subject to payment of the purchase-money: but the relationship which is thus created does not entail all the obligations of an ordinary trusteeship (*a*). The vendor is not a mere dormant trustee; he is a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that

(*a*) *Wall* v. *Bright*, 1 J. & W. 501; *Rose* v. *Watson*, 10 H. L. C. 672.

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interest, if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsists, but subject to the paramount right of the vendor to protect his own interest as vendor of the property (*b*). When the title has been accepted and the purchase-money paid, this paramount right of the vendor ceases, and the trusteeship subsists without any qualification; but as from the date of the contract the relationship is throughout that of trustee and *cestui que trust* (*c*). Thus, although the vendor can, in the absence of express stipulation, insist on retaining the property until completion of the purchase, it would, before the passing of the Conveyancing Act, 1881, have passed under his devise of trust estates (*d*); and he may be responsible as a trustee, if, pending completion, he allow the property to go out of cultivation or to become deteriorated (*e*).

Section 2.

As to purchaser's general rights under contract as against vendor.

General nature of purchaser's equitable ownership.

(2.) *As to purchaser's general rights under contract as against vendor.*

It is sometimes stated, in general terms, that by the contract, the purchaser becomes, in Equity, the owner of the property: but "this rule applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property" (*f*); nor, *semble*, can he as against the vendor enforce such equities, without at the same time

(*b*) Per Lord Cairns in *Shaw* v. *Foster*, L R. 5 H.L. 321, see p. 338. But he is not so within the Trustee Acts, see *Re Carpenter*, Kay, 418; *Re Colling*, 32 Ch. D. 333; and see *post*, p. 662.

(*c*) See judgment of James, L J., in *Rayner* v. *Preston*, 18 Ch. D. 13.

(*d*) *Lysaght* v. *Edwards*, 2 Ch. D. 499.

(*e*) *Earl of Egmont* v. *Smith*, 6 Ch. D. 469; and see *Phillips* v. *Silvester*, 8 Ch. 173, in which the vendors were held liable for deterioration on the footing of wilful default, as if they were mortgagees in possession; *sed quære*, and see as to this case *post*, p. 733; although it has been followed in *Royal Bristol Building Soc.* v. *Bomash*, 35 Ch. D. 390.

(*f*) Per Lord Cottenham, in *Tasker* v. *Small*, 3 M. & C. 70; and see *Wall* v. *Bright*, 1 J. & W. 501.

praying or offering specific performance of the contract itself (*g*). So, notice of an incumbrance given to the purchaser before the execution of the conveyance, is effectual, although the purchase-money be actually paid (*h*); and even after the execution of the conveyance, if the purchase-money be not actually paid (*i*), the purchaser, although he may then have, or subsequently acquire, the legal estate, can, it is conceived, use it against the incumbrancer only to the extent of securing such purchase-money. His interest under the contract may, however, be charged, or assigned (*k*); and used to be bound by a judgment (*l*): but such incumbrancer, assignee, or creditor, can only obtain relief, as against the vendor, on the terms of undertaking all the purchaser's liabilities under the contract (*m*); and, apparently, the vendor is not bound by notice of an incumbrance which does not purport to give the incumbrancer an immediate right to offer himself as the substitute for the purchaser (*n*).

Is capable of alienation.

Up to the time fixed for completion, the vendor is, in the absence of special stipulation, entitled to the crops, or other ordinary profits of the land: he would not, however, it is conceived, be entitled to take crops in an immature state, or otherwise than in due course of husbandry. After the time fixed for completion, and pending negotiation, he may, it appears, in due course of husbandry, cut coppice and get in crops, but the net profits will belong to the purchaser (*o*). Where the contract was for the purchase of an estate, including the growing crops, to be completed and possession given on the 24th June, and the time was extended by consent till the 29th September, and the vendor in the interval sold the crops,

Vendor's right to crops, &c. pending completion.

(*g*) *Fox* v. *Purssell*, 3 S. & G. 242.

(*h*) *Wigg* v. *Wigg*, 1 Atk. 384.

(*i*) *Tildesley* v. *Lodge*, 3 S. & G. 543.

(*k*) *Paine* v. *Meller*, 6 V. 349, 352; *Seton* v. *Slade*, 7 V. 274; *Dowson* v. *Solomon*, 1 Dr. & S. 1.

(*l*) *Baldwin* v. *Belcher*, 1 J. & L. 18; *Walcott* v. *Lynch*, 13 Ir. Eq. R. 199; *Grey Coat Hospital* v. *Westminster Im. Commrs.*, 1 D. & J. 531.

(*m*) *Dyer* v. *Pulteney*, Barn. C. 160.

(*n*) See and consider *McCreight* v. *Foster*, 5 Ch. 604.

(*o*) *Poole* v. *Shergold*, 1 Cox, 273; Sug. 644; see as to manorial fines, on purchase of a manor, *Garrick* v. *Lord Camden*, 2 Cox, 231 (stated *post*, p. 1342); and *Earl of Hardwicke* v. *Lord Sandys*, 12 M. & W. 761; *Cuddon* v. *Tite*, 1 Gif. 395.

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the purchaser was held entitled, in Equity, only to the crops growing at the time of the actual completion, and was left to his remedy (if any) at Law for the recovery of the produce of the crops (*p*).

Windfalls, &c. belong to purchaser.

Everything, however, which forms part of the inheritance belongs to the purchaser from the date of the contract; so that he is entitled to windfalls (*q*), and to the produce of ordinary timber cut (*r*), or, it is conceived, stone or gravel quarried or dug by the vendor after the contract (*s*).

Material alteration of property by vendor avoids the contract.

And any act of the vendor, which prevents his giving to the purchaser that which was, substantially, the subject-matter of the contract, renders the agreement voidable by the latter; *e. g.*, the felling of ornamental timber (*t*): and, even as to ordinary timber, the authorities merely show that the fall of it *may* be matter for compensation. But cases might, it is conceived, occur, in which the Court would relieve a purchaser on account of falls of wood, although neither planted nor left for ornament or shelter, *e. g.*, as where sufficient is not left for repairs, or where the general character or appearance of the estate, or of any special part of it, is materially altered.

Purchaser takes accidental benefits, and bears accidental losses, as in cases of death of tenant for life:

And since, as between the parties to the contract, the purchaser is owner of the estate, he has the benefit of any improvements to the property which may happen after the date of the contract (*u*); *e. g.*, the dropping of lives on the purchase of a reversionary interest (*x*); or a sudden rise in the value of land from its being required for a public purpose (*y*): and must bear any loss which occurs without the

(*p*) *Webster* v. *Donaldson*, 34 B. 451. *Quære*, the legal remedy.

(*q*) *Poole* v. *Shergold*, 1 Cox, 273.

(*r*) *Magennis* v. *Fallon*, 2 Moll. 591.

(*s*) See *Nelson* v. *Bridges*, 2 B. 239.

(*t*) *White* v. *Nutt*, 1 P. W. 61; *Spurrier* v. *Hancock*, 4 V. 667, 674; *Magennis* v. *Fallon*, *suprà*. As to the measure of damages, where the purchaser claims specific performance, see *Krehl* v. *Park*, 31 L. T. 325.

(*u*) Expenditure upon the property by the vendor seems to fall within the rule; see *Monro* v. *Taylor*, 8 Ha. 60, *Clare Hall* v. *Harding*, 6 Ha. 296.

(*x*) *Hanford* v. *Purrier*, 1 Mad. 539.

(*y*) *Paine* v. *Meller*, 6 V. 352.

fault of the vendor; *e. g.*, the deterioration of the property through the calamities of the times (*z*); the death of the *cestui que vie*, on the purchase of an estate for life, or a life annuity (*a*); or the admission of younger lives to copyhold tenements on the purchase of a manor, and the consequent diminution in the value of the fines (*b*); or the destruction of house property by fire (*c*), or an earthquake (*d*); and, as respects fire, the vendor, unless he agree that the property shall be kept insured (*e*), or, it would seem, make some proposition to the purchaser grounded upon the fact of its being insured, need not keep up the insurance, or give the purchaser notice of its having dropped (*f*); but if the omission by the vendor to keep up the insurance renders the title impeachable, the purchaser, it seems, may be discharged (*g*); so, if the vendor, though not bound to insure, effects an improper insurance, and the property thereby becomes liable to forfeiture, he cannot enforce the contract (*h*). The purchaser of house property must, as between himself and the vendor, make good any injury done to adjoining premises by the fall of the buildings subsequently to the contract (*i*).

or of *cestui que vie*:

or fire.

Vendor, whether bound to insure.

And where the accruing benefit is such, that, if taken by the purchaser, it would or might be irrecoverably lost to the vendor (as in the case of a vacancy occurring pending discussions on the title to an advowson), the purchaser claiming the benefit must, as a general rule, accept the title (*k*): in *Wyvill* v. *Bishop of Exeter* (*l*), the right to present was

Restrictions on purchaser's right,—case of vacancy on sale of advowson.

(*z*) *Poole* v. *Shergold*, 2 Br. C. C. 118.

(*a*) Sug. 292; and see 6 V. 352.

(*b*) *Cuddon* v. *Tite*, 1 Gif. 395.

(*c*) *Paine* v. *Meller*, 6 V. 349; *Harford* v. *Purrier*, 1 Mad. 532, 539; and see *Poole* v. *Adams*, 12 W. R. 683; V.-C. K.; and especially *Rayner* v. *Preston*, 18 Ch. D. 1, and *Castellain* v. *Preston*, 11 Q. B. D. 380; *et vide ante*, p. 196; *post*, p. 913, where these cases are commented on. *Aliter*, if the vendor have agreed to repair or alter the premises, and have not done so before the fire; *Counter* v. *Macpherson*, 5 Mo. P. C. 83, 106.

(*d*) *Cass* v. *Rudile*, 2 Vern. 280; but see 1 Br. C. C. 157, n., where the case is said to be misreported.

(*e*) *Poole* v. *Adams*, 12 W. R. 683.

(*f*) 6 V. 353.

(*g*) *Palmer* v. *Goren*, 25 L. J. Ch. 841.

(*h*) *Douson* v. *Solomon*, 1 Dr. & S. 1.

(*i*) *Robertson* v. *Skelton*, 12 B. 260, 266.

(*k*) Sug. 293.

(*l*) 1 Pri. 292.

altogether denied him, on the ground of his objections to the title having been frivolous; but the case seems of doubtful authority (*m*).

Sale in consideration of life annuity; and death of *cestui que vie* before conveyance.

So, in the converse case of an estate being sold in consideration of a life annuity, and of the *cestui que vie* dying before completion, the purchaser will be entitled to a conveyance on payment of the arrears (*n*). It is, however, as a general rule, essential, in such a case, that he should, in the lifetime of the *cestui que vie*, have made, or tendered, any payment which became due during such lifetime (*o*): but the rule, it is presumed, would not apply unless a sufficient interval had elapsed between the payment becoming due and the death to allow of payment or tender being made according to the usual course of business; the omission, in fact, must amount to *laches* (*p*): nor, on the other hand, where a payment had been previously refused or long neglected, is it likely that a Court of Equity would be satisfied with payment or tender made at a time when the *cestui que vie* was, to the knowledge of the purchaser, dying or dangerously ill. And although the Court, upon sales in consideration of an annuity, will enforce specific performance notwithstanding the death of the annuitant, it will inquire with some jealousy into the fairness of the transaction; and will, under such circumstances (*q*), require a clear case for specific performance.

Not entitled until completion to parliamentary franchise.

A purchaser is not entitled, before completion, to vote at the election of a member of parliament in respect of the land purchased (*r*).

Sales by Court.

We shall hereafter have occasion to consider the above rules, with reference to sales under a decree of the Court (*s*).

(*m*) Sug. 293; Fry, 400.

(*n*) *Mortimer* v. *Capper*, 1 Br. C. C. 156; *Baldwin* v. *Boulter*, *ibid.*, cited in *Coles* v. *Trecothick*, 9 V. 234, 246.

(*o*) *Jackson* v. *Lever*, 3 Br. C. C. 605; *Pope* v. *Roots*, 1 Br. P. C. 370.

(*p*) See Sug. 295.

(*q*) *Davies* v. *Cooper*, 5 M. & C., see p. 279.

(*r*) *Anelay* v. *Lewis*, 17 C. B. 316; unless, of course, he is in actual possession within 6 & 7 V. c. 18, s. 74.

(*s*) See Ch. XX.

(3.) *As to vendor's general rights under contract as against purchaser.*

As to vendor's general rights under contract as against purchaser.

Vendor's lien on estate.

He may restrain a fall of timber by purchaser in possession.

The vendor has a lien upon the estate for the unpaid purchase-money (*t*): if, therefore, before payment, the purchaser be in possession, Equity will restrain him from any act,—such as felling timber,—by which the vendor's security might be lessened (*u*). If, however, only an inconsiderable part of the purchase-money remain unpaid, it may be conjectured that the vendor applying for the injunction, would, as would an ordinary mortgagee, have to satisfy the Court that the estate without the timber was an insufficient security (*x*); and it is also presumed that the injunction might be so extended as to restrain the cutting of underwood out of the due course of husbandry (*y*), or any other similarly prejudicial act.

Judgment is a lien on unpaid purchase-money.

Prior to the 27 & 28 Vict. c. 112, a judgment entered up against the vendor subsequently to the contract, and registered, was a lien upon the unpaid purchase-money (*z*); and, consequently, to that extent, upon the land itself. And an extent upon Crown process, at any time before conveyance, binds the purchaser although he has paid his money (*a*).

Vendor's rights, on death of purchaser without heir before completion.

Prior to the Intestates' Estates Act, 1884 (*b*), it seems probable that if the purchaser died intestate and without an heir, before conveyance, the vendor might have kept the estate and any part or all of the purchase-money, if paid (*c*); as there was no escheat of equitable estates (*d*). But by sect. 4 of the Act,

(*t*) As to which, *vide* Ch. XIV., sect. 1.

(*u*) *Crockford* v. *Alexander*, 15 V. 138.

(*x*) See *Humphreys* v. *Harrison*, 1 J. & W. 581; *Hippesley* v. *Spencer*, 5 Mad. 422; *King* v. *Smith*, 2 Ha. 239.

(*y*) *Humphreys* v. *Harrison*, *ubi suprà*.

(*z*) Prid. J. 20; *post*, p. 540. See *Guest* v. *Cowbridge R. Co.*, 6 Eq. 619.

(*a*) *Rex* v. *Snow*, 1 Pr. 220, n.; see 2 & 3 V. c. 11, ss. 8, 9, 10, and 11.

(*b*) 47 & 48 V. c. 71.

(*c*) See Sug. 295, 296, commenting on *Burgess* v. *Wheate*, 1 W. Bl. 1231.

(*d*) *S. C.*; *Beale* v. *Symonds*, 16 B. 406.

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where a person dies without an heir and intestate in respect of any real estate, consisting of any estate or interest, whether legal or equitable, in any incorporeal hereditament, or of any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat is to apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments.

Tenancy of purchaser, whether determined by contract.

Where the purchase is by a tenant, either from year to year or for a longer term, the contract will not determine the tenancy, unless specially worded so as to be an absolute contract for purchase whether the vendor do or do not show a good title (*e*): but Equity will restrain the landlord from enforcing payment of rent pending completion (*f*).

Tenancy at will determined.

A mere tenancy at will appears to be determined by the contract (*g*) from the time at which possession is agreed to be given to the purchaser.

Purchaser in possession not liable for use and occupation, if no title.

It has been determined, that a purchaser who has been let into possession, pending discussions as to title, cannot, if the contract go off through defects in title, be sued for use and occupation: even although the occupation may have been a beneficial one (*h*): nor can he, unless he agreed to quit on some specified event which has happened (*i*), be ejected without a demand of possession (*k*). The above questions should, of course, be provided for by special agreement where the purchaser is let into possession before payment, or where the purchase is by a tenant. And where there was an agree-

(*e*) *Doe* v. *Stanion*, 1 M. & W. 695; *Tarte* v. *Darby*, 15 M. & W. 601.

(*f*) *Daniels* v. *Davison*, 16 V. 253.

(*g*) Sug. 178.

(*h*) *Winterbottom* v. *Ingham*, 7 Q. B. 611; and see *Kirtland* v. *Pounsett*, 2 Taun. 145, where the Court seemed to attach importance to the fact of the purchaser having paid part of the purchase-money, see p. 147; but this, although it was also the case in *Winterbottom* v. *Ingham*, does not seem to have been there considered material. See, in Equity, *Stevens* v. *Guppy*, 3 Rus. 171; *Williams* v. *Shaw*, *ib.* 178, n.

(*i*) *Doe* v. *Sayer*, 3 Camp. 8.

(*k*) See *Doe* v. *Stanion*, 1 M. & W. 700; *Right* v. *Beard*, 13 Ea. 210.

ment that the purchaser should receive all rents and profits from the date fixed for completion, he was held to be entitled as from that date to an occupation rent from the vendor who had remained in possession (*l*). A purchaser who has let a tenant into possession, can maintain an action for use and occupation against him, although the purchase be not completed; the tenant being estopped from disputing the title of the party from whom he received actual possession (*m*).

Expenditure by vendor.

It seems probable that if, after the contract, the vendor lay out money on the property, *e.g.*, in obtaining a renewal of the lease on which it is held, he has no claim on the purchaser for the expenditure (*n*); but this rule, it is conceived, could not apply to expenditure essential to the preservation of the property, and incurred by the vendor after the expiration of the time fixed for completion,—the delay resting with the purchaser.

Section 4.

Rights of vendor and purchaser, *inter se*, not affected by death, bankruptcy, &c. of either party.

(4.) *Rights of vendor and purchaser*, inter se, *not affected by death, bankruptcy, &c. of either party.*

Contract not avoided by death, bankruptcy, or insolvency.

The contract, when once entered into, will not, without an express stipulation to that effect, be avoided by the death, bankruptcy, or lunacy (*o*), of both or either of the parties, even before the time fixed for completion.

Election by assignees of

Previously to the Bankruptcy Act, 1869, upon the bankruptcy of a purchaser, the vendor might require the assignees to elect whether they would abandon or perform the contract;

(*l*) *Met. R. Co.* v. *Defries*, 2 Q. B. D. 189, 387; and see *Shannon* v. *Shakespeare*, 5 D. M. & G. 517.

(*m*) See *Doe* v. *Mills*, 4 N. & M. 25, 29; and *Hull* v. *Vaughan*, 6 Pr. 157. See the doctrine of estoppel between landlord and tenant explained, *Langford* v. *Selmes*, 3 K. & J. 226; *Morton* v. *Woods*, L. R. 4 Q B 293.

(*n*) *Ante*, p. 286, n. (*u*); and *vide post*, p. 733, on *Phillips* v. *Sylvester*, 8 Ch. 173.

(*o*) *Winged* v. *Lefebury*, 2 Eq Ca. Ab. 32; *Orlebar* v. *Fletcher*, 1 P. W. 737, *Owen* v. *Davies*, 1 V. 82, *Brooke* v. *Hewitt*, 3 V. 255; *Whitworth* v. *Davies*, 1 V. & B. 545; *Valpy* v. *Oakley*, 16 Q. B. 941; Sug 170, 220, as to lunacy, see 16 & 17 V. c. 70, s. 122.

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bankrupt under the old laws.

and, if they failed to declare their election (*p*), he might apply by petition for delivery up of the agreement and for possession of the premises (*q*): and if, in any case, they allowed a reasonable time to elapse without requiring the contract to be performed, they were considered to have abandoned it (*r*); and the question, what was a reasonable time, would, in an action at Law, be left to the jury (*s*): or the vendor might petition for a resale of the property, and for payment of the amount remaining due to him, and for leave to prove for the deficiency (*t*) (if any).

Disclaimer by trustee of bankrupt under the recent Act.

The Act of 1869 (*u*), instead of leaving it to the election of the trustee in bankruptcy whether he would perform or abandon a contract entered into by the bankrupt, empowered him within certain limits as to time to disclaim any property of the bankrupt which might consist of unprofitable contracts, or be otherwise burdensome or unsaleable (*x*). These statutory provisions as to disclaimer, which were frequently the subject of judicial decision, are now repealed by the Bankruptcy Act, 1883 (*y*), which provides, in effect (*z*), that the trustee of the bankrupt's property may, notwithstanding that he has endeavoured to sell, or has taken possession or exercised acts of ownership, by writing under his hand, under certain conditions, disclaim any property of the bankrupt which is of a burdensome or unsaleable description, including unprofitable contracts; and such disclaimer will operate to determine, as from its date, the rights, interests, and liabilities of the bankrupt and his property in, or in respect of, the property disclaimed; and will also discharge the trustee from all personal liability in respect of the property disclaimed as from the

(*p*) As to what amounted to election, see *Hastings* v. *Wilson*, Holt, N. P. 290.

(*q*) 6 Geo. IV. c. 16, s. 76, 12 & 13 V. c. 106, ss. 145, 146; 24 & 25 V. c. 134, ss. 131, 150.

(*r*) *Laurence* v. *Knowles*, 7 Sc. 381.

(*s*) *S. C.*

(*t*) *Boulks* v. *Rogers*, 6 Ves 95, n.; *Hope* v. *Booth*, 1 B. & Ad. 498.

(*u*) 32 & 33 V. c. 71.

(*x*) See sects. 23 and 24.

(*y*) 46 & 47 V. c. 52.

(*z*) See sect. 55, and G. R. 1886, R. 320. As to the effect of a disclaimer of freehold property of the bankrupt burdened by onerous covenants, see *Re Mercer and Moore*, 14 Ch. D 287.

date when the property vested in him, but will not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person.

Section 5.

Death of vendor before completion: its effect on relative rights of his real and personal representatives, under old, and under new law.

(5.) *Death of vendor before completion: its effect on relative rights of his real and personal representatives, under old, and under new law.*

Purchase-money and interim profits.

Upon the vendor's death, the unpaid purchase-money, although, by the agreement, made payable as he shall appoint (*u*), forms part of his personal estate (*x*): the profits of the land from his death up to the time fixed for completion belong to his real representatives (*y*): as until that time there is no conversion.

Legal estate.

If he die before conveyance, the legal estate, unless the law of descent in such a case has been altered by the Conveyancing Act, 1881, descends on his heir or devisee; and in the event of his death without an heir and intestate, a conveyance of the legal estate was, until the recent change of the law, usually obtained under the provisions of the Trustee Act, 1850 (*z*).

Heirs of equitable vendor necessary parties to conveyance.

And it has been held that where the vendor of an equitable estate died before completion, his heirs were necessary parties to the conveyance (*a*): but in such a case the Court would not make any order purporting to vest the outstanding interest

(*u*) *Thompson* v. *Towne*, 2 Vern. 319; and see 1 V. c. 26, s. 27.

(*x*) *Fletcher* v. *Ashburner*, 1 Br. C. C. 497; 1 Wh. & T. L. C.; *Baden* v. *Countess of Pembroke*, 2 Vern. 213, 215; *Eaton* v. *Sanxter*, 6 Si. 517; see as to standing timber, *Anon.*, cited 7 V. 437, Sug. 188; see *Lord Hatherton* v. *Bradburne*, 13 Si. 599: where the question was whether the consideration payable for a mining licence was purchase-money or rent.

(*y*) *Lumsden* v. *Fraser*, 12 Si. 263.

(*z*) 13 & 14 V. c. 60; or, formerly, under the 4 & 5 Will. IV. c. 23, see *Re Loue's Estate*, 2 Ph. 690; *vide post*, p. 655 *et seq.*

(*a*) *Duly* v. *Nalder*, 35 L. J. Ch. 52; see, too, *Hoddel* v. *Pugh*, 33 B. 489.

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in the purchaser (b): a vesting order being appropriate only in respect to a legal estate.

Conveyancing Act, 1881.

The Conveyancing Act, 1881, contains two important provisions bearing on this subject. By sect. 4, it is provided that where, at the death of any person, there is subsisting a contract, enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representatives are by virtue of the Act to have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract. This section does not alter the rule of descent; it simply confers on the legal personal representative a statutory power to convey, which may apparently be exercised in every case where there is a subsisting binding contract capable of being enforced against the heir or devisee. By sect. 30 it is enacted, that where, since the Act came into operation, an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust or by way of mortgage in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him with all the powers and incidents attaching to a chattel real; and for the purposes of the section the personal representatives for the time being of the deceased are to be deemed in law his heirs and assigns within the meaning of all trusts and powers (c); and sect. 48 of the Land Transfer Act, 1875, is repealed. Whatever may be the precise nature of the fiduciary relation which is created between the vendor and the purchaser by the contract, it is clear that this section,

(b) *Re Williams' Estate*, 5 De G. & S. 515.

(c) It has been held in Ireland that this section does not enable the personal representatives to make a title, where the heir of the last surviving trustee could not formerly have done so; *Re Ingleby and Norwich Insurance Co.*, 13 L. R. Ir. 326; see *post*, p. 683.

although in terms it includes all estates held on any trust, was passed *diverso intuitu;* and it seems to be the sounder view that if the vendor dies before completion, the property which he has contracted to sell is not vested in him upon a trust, so as to be descendible on his legal personal representatives within the meaning of the Act, and that the purchaser, if he seeks to enforce the contract, must rely entirely on the provisions of the 4th section. And it would seem that the purchaser ought to preserve the contract, or evidence of it, as a necessary part of his title.

Under old law, contract revoked prior devise in Equity.

In cases governed by the law as it existed before the new Wills Act (*d*), (and which, it must be remembered, is still binding in all cases where the will has not been made or republished, &c., on or since the 1st of January, 1838), the contract for sale (assuming it to be binding as against the vendor) is, in Equity, a revocation of a prior devise of the property (*e*); the legal estate passes to the devisee, but merely as a trustee; and the purchase-money belongs to the personal estate. And even if the estate be devised in trust for sale, and then be agreed to be sold by the testator, the purchase-money will not belong to the legatees of the proceeds of sale (*f*).

Although devise was in trust to sell.

Relative rights of vendor's real and personal representatives depended on his liability to perform the contract.

In all cases, the question between the real and personal representatives seems to be this, *viz*, whether the vendor at the time of his death was, either absolutely or contingently, under such an agreement as Equity would enforce against him (*g*): if so, the property (as between his real and personal representatives), forms part of his personal estate from the time fixed for completion; whether such time be specified in the contract, or have to be determined by the occurrence of

(*d*) 1 V. c. 26.

(*e*) *Cotter* v. *Layer*, 2 P. W. 624; *Knollys* v. *Alcock*, 5 V. 654; *Bennett* v. *Lord Tankerville*, 19 V. 178, and see *Vauser* v. *Jeffery*, 3 Rus. 479, 484.

(*f*) *Arnald* v. *Arnald*, 1 Br. C. C. 401; *Newbold* v. *Roadknight*, 1 R. & M. 677; see *Saunders* v. *Cramer*, 3 D. & War. 87.

(*g*) See *A.-G.* v. *Day*, 1 V. 220; *Knollys* v. *Alcock*, 7 V. 558; Sug. 186.

some collateral event, or depend upon the mere option of the purchaser (*h*): and is liable to probate duty in the hand of his executors (*i*): but unless and until such event occur, or such option be declared, the estate (in the case of intestacy) belongs to the heir (*k*); or in the case of a devise (either after (*l*) or before (*m*) the contract), to the devisee, unless the contract evidence a contrary intention; which intention is not evidenced by a special reservation of the rent and profits, until completion, in favour of the vendor, his *heirs, executors, and administrators* (*n*).

For example, where a lessee of real estate with an option of purchasing the fee at the end of a term of years, exercised his option after the death of the lessor, it was held that the realty was thereby converted into personalty as between the lessor's real and personal representatives (*o*). So, where, after the date of his will, a testator entered into a contract, giving an option to purchase which was exercised after his death, it was held that the property was converted as from the date of the exercise of the option; and that the purchase-money belonged to the residuary legatees, and not to the specific devisee of the estate, who was entitled only to the intermediate rents (*p*): and an agreement between conflicting claimants of an estate, that the same should be sold and the produce divided, has been held a conversion (*q*): so have the adoption and completion by the heir of his ancestor's parol contract for sale (*r*). But the principle applies only as

(*h*) *Lawes* v. *Bennet*, 1 Cox, 167; cited 7 V. 436; and 4 V. 596. See *Emuss* v. *Smith*, 2 De G. & S. 722; *Goold* v. *Teague*, 5 Jur. N. S. 116. As to what amounts to election, see *Padbury* v. *Clark*, 2 M. & G. 298.

(*i*) *A.-G.* v. *Brunning*, 8 H. L. Ca. 243; *A.-G.* v. *Hubbuck*, 13 Q. B. D. 278.

(*k*) *Townley* v. *Bedwell*, 14 V. 591.

(*l*) Sug. 187.

(*m*) *Hunter* v. *Watson*, a case decided by Lord Selborne in May, 1874, but not reported.

(*n*) *Shadforth* v. *Temple*, 10 Si. 184.

(*o*) *Collingwood* v. *Row*, 5 W. R. 484; *Townley* v. *Bedwell*, 14 V. 591. But see *Drant* v. *Vause*, 1 Y. & C. C. C. 580; *Emuss* v. *Smith*, 2 De G. & S. 722; cf. *Bowen* v. *Barlow*, 11 Eq. 454.

(*p*) *Weeding* v. *Weeding*, 1 J. & H. 424.

(*q*) *Hardey* v. *Hawkshaw*, 12 B. 552.

(*r*) *Frayne* v. *Taylor*, 10 Jur. N. S. 119.

between the real and personal representatives of the vendor, and not as between the vendor and the purchaser (s).

Sale in testator's lifetime without his authority.

Where chattels specifically bequeathed were sold by the friends of the testator during his life, he being then a lunatic and so continuing until his decease, this was held to be no conversion as between the specific legatee and the residuary legatee, although the unauthorized sale was approved and confirmed by the Court in an administration suit: and the fact of the specific legatee having actively concurred in the sale did not affect her right, she being then under coverture (t).

Conversion on purchases by railway companies.

And it has been held that when a railway or other public company, in exercise of its compulsory power, gives due notice of its intention to take land, mere acquiescence by the owner in such notice, will (unless he be *non compos*, or under some other personal disability), (u) be considered equivalent to a contract, and have the effect of converting the property into personalty (x). But, in a modern case, where the earlier decisions were fully reviewed, the precise effect of the service of such a notice was accurately defined: for certain purposes, and to the extent of fixing the quantity of land to be taken, the service of the notice may be said to constitute the relation of vendor and purchaser; but until the negotiations thus originated result in a formal agreement, or in acts of the parties equivalent thereto (as, *e.g.*, the fixing of the price by arbitration), there is no contract which the Court can specifically enforce at the suit of either party, and therefore no conversion (y). Thus where, after service of the notice, the vendor stated the price which he was willing to take, but died before his offer was accepted, it was held that, although

(s) *Edwards* v. *West*, 7 Ch. D. 858.

(t) *Taylor* v. *Taylor*, 10 Ha. 475.

(u) *M. R. Co.* v. *Oswin*, 1 Coll. 74, 80; but see *Re East Lincolnshire R. Act*, 1 Si. N. S. 260; and 6 Mo. P. C. 397.

(x) *Ex p. Hawkins*, 13 Si. 569; and see *Richards* v. *A.-G. of Jamaica*, 6 Mo. P. C. 381, but see *Adams* v. *Blackwall R. Co.*, 2 M. & G. 118, 129; *In re Stewart*, 1 S. & G. 37.

(y) *Haynes* v. *Haynes*, 1 Dr. & S. 426, and cases cited in judgment; and *vide ante*, p. 242 *et seq.*

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the purchase was afterwards completed at the price asked, there was no conversion (z); so, where the contract with the landowner merely fixed the price per acre, without specifying the quantity to be taken, the purchase-money paid for land taken after the owner's death was held to be realty (a); but where after service of the notice, two surveyors were appointed under the L. C. C. Act, and the landowner verbally agreed to accept the price thus ascertained, but died before completion, having by a will, long prior to the notice, specifically devised the property to A., it was held that there was a valid contract, and that the devise to A. was adeemed; but that A. was entitled to the rents which accrued between the death of the testator and the completion of the purchase (b).

Where owner is a lunatic or under disability.

In the absence of express clauses for the purpose, it is not the effect of a Railway Act to alter the course of the devolution of the property without the owner's consent or election; and it is now well settled that if the owner be a lunatic, or under any other incapacity, the purchase-money for the land taken retains the character of realty (c). Where money was paid into Court under certain local Acts, and one of the persons entitled was convicted of felony and transported, it was held that his share was to be considered as realty, and that it was not forfeited to the Crown (d).

Excessive sale by the Court.

Where, on a sale by order of the Court, real estate is sold in excess of what is required to satisfy the purpose for which the sale is directed, the surplus proceeds have been held to retain the character of realty (e); but in a recent case (f) the propriety of this doctrine was questioned by Sir George Jessel,

(z) *Re Arnold*, 32 B. 591.

(a) *Ex p. Walker*, 1 Dr. 508.

(b) *Watts* v. *Watts*, 17 Eq. 217; see the V.-C.'s comments on *Ex p. Hawkins*, and *Haynes* v. *Haynes*; and see also *Harding* v. *Met. R. Co.*, 7 Ch. 154.

(c) *M. R. Co.* v. *Oswin*, 1 Coll. 74, 80; *Re Sloper*, a case decided by the Lords Justices, and cited 22 B. 198; *Re Tugwell*, 27 Ch. D. 309, where *Ex p. Flammank*, 1 Si. N. S. 260, was dissented from.

(d) *Re Harrop's Estate*, 3 Dr. 726.

(e) *Jermy* v. *Preston*, 13 Si. 356, 366; *Cooke* v *Dealey*, 22 B. 196.

(f) *Steed* v. *Preece*, 18 Eq. 192; and see *Crowther* v. *Bradney*, 28 L. T. 464.

M. R., who expressed it as his opinion that "if a conversion is rightfully made, whether by the Court or a trustee, all the consequences of a conversion must follow, and that there is no equity in favour of the heir or anyone else to take the property in any other form than that in which it is found; and that the sole question is whether the estate has been rightfully or wrongfully sold" (*g*): and this has been followed in a later case, where a mere order for sale was held to effect a conversion (*h*).

Sale of settled estates.

In cases of settled estate it has been held that acquiescence in a notice to treat by a railway or other public company, and negotiations as to the price, do not amount to an equitable exercise by tenants for life of an absolute power of appointment, so as to operate as a conversion of the estate into personalty as against remaindermen claiming under the limitations in default of appointment (*i*): nor where the estate is convertible at the request of a tenant for life is conversion the necessary result of the money having been paid into Court and invested in Consols on his application, and of his having received the dividends (*k*). Of course even in the case of an absolute owner, an agreement which, in anticipation of the possibility of land being taken by the company, merely fixes the price of any land which may eventually be so taken, is no conversion (*l*). But conversion is the necessary result of an actual binding contract for sale, although the landowner has in fact no option but to sell (*m*). Compensation for severance, &c., is subject to the same rules as purchase-money (*n*).

(*g*) *Steed* v. *Preece*, 18 Eq. 192. It was subsequently held by the same judge that in the provisions of sects. 23 to 25 of the 19 & 20 V. c. 120, which is to be read as part of the Partition Act, 1868, there is such an equity; *Foster* v. *Foster*, 1 Ch. D. 588; and see *Mordaunt* v. *Benwell*, 9 Ch. D. 302; *Re Pickard*, 53 L. T. 293; and see *post*, p. 1302.

(*h*) *Dixon* v. *Arnold*, 19 Eq. 113; *Hyett* v. *Mekin*, 25 Ch. D. 735. It was held otherwise in Ireland in a sale under a foreclosure decree where more than enough to cover the mortgage was sold; *Scott* v. *Scott*, 9 L. R. Ir. 367.

(*i*) *Morgan* v. *Milman*, 3 D. M. & G. 24.

(*k*) *Re Taylor*, 9 Ha. 596; *Re Stewart*, 1 S. & G. 32; *Re Horner*, 5 De G. & S. 483.

(*l*) *Ex p. Walker*, 1 Dr. 508.

(*m*) *Re Manchester, &c. R. Co.*, 19 B. 365.

(*n*) *Ibid.*

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Effect of contract on prior devise.

A contract under a power of sale in a settlement revokes a subsisting devise by the tenant for life, of the reversion in fee over which he has a power of testamentary appointment; and, although the contract is not completed at his death, the devisee is not entitled to the benefit of the vendor's lien for unpaid purchase-money (*o*).

Rights of vendor's representatives unaffected by contract binding only purchaser.

If, at the vendor's death, there be a binding contract as against the purchaser, but no binding contract has been entered into by the vendor, the rights of his heir or devisee are, of course, unaffected; but if in such a case the heir or devisee were to concur with the personal representative in enforcing the contract, it would appear that it would enure for the benefit of the latter.

Events subsequent to vendor's death immaterial.

If the contract were binding upon both parties at the time of the vendor's death, no subsequent act or matter can alter the relative rights of his representatives (*p*): so that, if the purchaser subsequently act so as to lose his right under the contract, the estate belongs in Equity to the next of kin of the vendor (*q*).

Effect of contract being mutually rescinded before death.

If the contract (originally binding) be rescinded or abandoned by both parties in the lifetime of the vendor, there seems to be ground to contend, under the old law, that the rights of the devisee are restored (*r*): if, however, it were held that the devisee could not take, the heir would be entitled beneficially.

Effect of its ceasing during his life to bind him:

If, during the vendor's lifetime, the purchaser alone abandon the contract, or act so as to relieve the vendor from his liability to convey the estate, it seems that the property

(*o*) *Gale* v. *Gale*, 21 B. 349; *Blake* v. *Blake*, 15 Ch. D. 481; but see *Re Johnstone's Settlement*, 14 Ch. D. 162.

(*p*) *Bennett* v. *Lord Tankerville*, 19 V. 179; and see *Tebbott* v. *Voules*, 6 Si. 40.

(*q*) *Curre* v. *Bowyer*, 5 B. 6, n.

(*r*) Sug. 186; but the point is doubtful; see *Knollys* v. *Alcock*, 7 V. 558; 19 V. 179. See, against the claim of the devisee, *Andrew* v. *Andrew*, 4 W. R. 520.

would be considered real estate at his decease (*s*); but unless the vendor have acquiesced in the vacation of the contract, there would seem to be a difficulty in maintaining the rights of the devisee against the heir, except in cases coming within the new law: and it has been decided that, under the old law, the contract operates as a revocation where the purchaser, having paid part of the purchase-money, becomes bankrupt before completion, and the vendor buys up his interest under the bankruptcy (*t*).

or the purchaser.

If, during the vendor's lifetime, he himself abandon the contract, or if, through want of title or for any other reason, the contract, at the time of his death, be capable of being enforced only *against* and not *by* him, the right of the personal representatives would seem to depend upon whether the purchaser do or do not choose to enforce specific performance (*u*); the case being, in effect, similar to those in which the purchaser has, *ab initio*, a mere option to purchase.

Effect of consent of jointress.

Where money is liable to be invested in land to be settled to uses in strict settlement, and all the uses are exhausted, except a legal jointure, the jointress having an equity to compel the investment of the money in land, the money must be treated as real estate as between the real and personal representatives of the person who, subject to this jointure, is entitled thereto; but it is probably otherwise as regards portioners (*x*).

Effect of general devise upon real estate contracted to be sold:

A general devise of all his real estates, by the vendor, after the contract, will, *primâ facie*, and in the absence of any limitations or other matter inconsistent with such an intention, pass the legal estate in the property contracted to be sold (*y*): but a general bequest by the vendor of "all his

(*s*) Sug. 191; 1 Jarm. 46 *et seq.*

(*t*) *Andrew* v. *Andrew*, 8 D. M. & G. 336.

(*u*) See 1 Jarm. 52 *et seq.*; see *Re Thomas*, 34 Ch. D. 166, where after the testator's death the trustees, finding they had no title, rescinded.

(*x*) *Walrond* v. *Rosslyn*, 11 Ch. D. 640.

(*y*) *Wall* v. *Bright*, 1 J. & W. 494. But the fact of there being also a devise of all the testator's trust estates,

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to an infant.

leasehold estates and securities for money," was held not to pass the leaseholds, which at the date of the will he had contracted to sell (z). Where the estate is devised to an infant, the necessity for a suit and a decree of the Court was not superseded by the fact of the will containing a devise of trust estates (a); but this case is now provided for by sect. 4 of the Conveyancing Act, 1881, which enables the personal representatives to convey.

Of specific devise.

Although the estate be devised expressly by name, the devisee, as a general rule, takes merely as a trustee for the purpose of carrying out the contract, and the purchase-money forms part of the personal estate (b): but if the contract is not to be completed until a date which happens after the testator's death, the devisee is entitled to the mesne rents and profits (c). Where a testator devised, by special description, lands subject to a mere option of purchase, to A., not in fee, but for life, with remainders over in strict settlement, it was held that the purchase-money was subject to the same limitations as had been declared of the lands (d). It may be doubted, whether the speciality of the description is a sufficient ground (e) for distinguishing such a case from the earlier cases of *Lawes* v. *Bennet* (f), and *Townley* v. *Bedwell* (g); but such a distinction may, it is conceived, be supported upon the ground that the estate was devised in a

is an indication of a contrary intention; and the real estate contracted to be sold passes under such devise; *Lysaght* v. *Edwards*, 2 Ch D. 499.

(z) *Gould* v. *Teague*, 5 Jur. N. S. 116.

(a) *Purser* v. *Darby*, 4 K. & J. 41, 43; see this case explained in *Lysaght* v. *Edwards*, 2 Ch. D. 499. As to costs of such a suit, see *post*, p. 1262.

(b) *Knollys* v. *Shepherd*, 1 J. & W. 499; see *Thirtle* v. *Vaughan*, 24 L. T. O. S. 5; *Cumming* v. *Reid*, 8 I. R. C. L. 166.

(c) So held by Lord Selborne sitting as M. R. in an unreported case of *Hunter* v. *Watson* in May, 1874; see also *Watts* v. *Watts*, 17 Eq. 217. Under the old law the contract for sale would have been an ademption of the devise.

(d) *Drant* v. *Vause*, 1 Y. & C. C. C. 580; see judgment. *Emuss* v. *Smith*, 2 De G. & S. 722; compare *Bowen* v. *Barlow*, 11 Eq. 454.

(e) See *dictum* to that effect in *Weeding* v. *Weeding*, 1 J. & H. 431.

(f) 1 Cox, 167. And see *Collingwood* v. *Row*, 3 Jur. N. S. 785.

(g) 14 Ves. 591. And see the explanation of the principle of this case in *Re Adams and Kensington Vestry*, 27 Ch. D. 394.

manner inconsistent with the intention that the devisees were to take, not beneficially, but merely for the purpose of effecting the sale.

Effect of 1 Vict. c. 26.

And the law, as above stated, appears to be unaltered by the 1 Vict. c. 26 (*h*); which, however, removes all doubt as to the devisee's right in cases where the contract is rescinded or abandoned by the vendor, or is not binding on him; and also is in favour of the devisee's beneficial interest in cases similar to *Knollys* v. *Shepherd* (*i*).

Vendor's interest is within Mortmain Act.

The vendor's interest under the contract is within the Statute of Charitable Uses (9 Geo. II. c. 36), and a bequest of it to a charity is void under the Act (*k*). So is a like bequest of a legacy charged on land (*l*), and of the premium payable for a lease (*m*).

Section 6.

Death of purchaser before completion: its effect on relative rights of his real and personal representatives under old, and under new law.

(6.) *Death of purchaser before completion: its effect on relative rights of his real and personal representatives, under old, and under new law.*

Upon the death of the purchaser before completion, the equitable ownership of the property contracted for (assuming it to be freehold or copyhold of inheritance) vests in his real representative, as *quasi* heir or *quasi* devisee; and until the Act amending Locke King's Act (*n*), he was *primâ facie* entitled to have the purchase-money paid or reimbursed to himself, out of the personal estate (*o*); and this although he

(*h*) *Farrer* v. *Lord Winterton*, 5 B. 1; *Moor* v. *Raisbeck*, 12 Si. 123; *M. R. Co.* v. *Oswin*, 1 Coll. 74, 80; *Ex p. Hawkins*, 13 Si. 569; *Gale* v. *Gale*, 21 B. 349.

(*i*) 1 J. & W. 499; see Sug. 187, 191.

(*k*) *Harrison* v. *Harrison*, 1 R. & M. 71.

(*l*) *Brook* v. *Badley*, 3 Ch. 672; see *Lucas* v. *Jones*, 4 Eq. 73.

(*m*) *Shepheard* v. *Beetham*, 6 Ch. D. 597.

(*n*) See 30 & 31 V. c. 69.

(*o*) *Fletcher* v. *Ashburner*, 1 Wh. & T. L. C.; *Langford* v. *Pitt*, 2 P. W. 629, 632; *Broome* v. *Monck*, 10 V. 597, 611, 615. If the executor complete, and take the conveyance in his own name, he will be a trustee for the heir or devisee; *Alleyn* v. *Alleyn*, Mos. 262.

was himself the vendor, and the purchaser's personal representative (*p*): and Locke King's Act (*q*) did not deprive the heir or devisee of his right to have the purchase-money paid out of the personal estate (*r*); a vendor's lien for unpaid purchase-money having been held not to be a sum charged on land by way of mortgage within the meaning of the Act (*s*); but by the Amendment Act (*t*), the word "mortgage" is to be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a *testator*, a provision which, by the further Amendment Act (*u*), was extended to the case of a purchaser dying intestate (*x*). The heir or devisee has the same disposing power over the estate as his ancestor or testator had (*y*).

Relative rights of real and personal representatives depend on his liability to perform contract.

As in the case of the vendor, so also in the case of the purchaser, the question between real and personal representatives is this, viz.: whether at the time of his decease, he was, either absolutely or conditionally, under a binding contract to purchase: if absolutely bound, or if conditionally or optionally bound, and the condition upon which the liability was to become absolute be subsequently fulfilled, or the vendor's option to sell be declared, the real representative is entitled (*z*). And his rights will not be affected by anything subsequent to the death of the purchaser: so that if by such subsequent matter (*e.g.*, the felling of ornamental timber by the vendor,) the contract cease to be binding on the purchaser's representatives (*a*), or be actually rescinded by the vendor on the ground of delay after the purchaser's decease (*b*), or in exercise of a power reserved by the contract (*c*), his real representative is nevertheless entitled to the

(*p*) *Coppin* v. *Coppin*, 2 P. W. 291.

(*q*) 17 & 18 V. c. 113.

(*r*) *Hood* v. *Hood*, 3 Jur. N. S. 684.

(*s*) *Barnwell* v. *Iremonger*, 1 Dr. & S. 255.

(*t*) See 30 & 31 V. c. 69, s. 2.

(*u*) 40 & 41 V. c. 34.

(*x*) For a discussion of the provisions of these Acts, see the recent case of *Re Cockcroft*, 24 Ch. D. 94; *vide post*, p. 920 *et seq.*

(*y*) See *Langford* v. *Pitt*, 2 P. W. 629.

(*z*) *Buckmaster* v. *Harrop*, 13 V. 456; and see *Earl Radnor* v. *Shafto*, 11 V. 448.

(*a*) 1 Jarm. 55; and see *Broome* v. *Monck*, 10 V. 597, 604.

(*b*) *Whittaker* v. *Whittaker*, 4 Br. C. C. 31; and see 10 V. 599.

(*c*) *Hudson* v. *Cook*, 13 Eq. 417.

purchase-money. And, it is conceived, the fact of the contract not being binding on the vendor at the time of the purchaser's death, does not affect the above rules.

If not liable his real representatives had no claim on his personal estate.

If, however, the contract gave the purchaser a mere option, which he had not declared at the time of his decease; or, if, through want of title in the vendor or any act or omission on his part, the agreement, although intended to be binding on both parties, was, at the time of the purchaser's death, binding only upon the vendor, the real representative of the purchaser has no claim upon the personal estate for the unpaid purchase-money; and an action by him against the personal representatives and the vendor, will be dismissed (*d*): but, upon principle, it would seem that, if he chose to pay for the estate out of his own pocket, he might enforce the contract against the vendor unless the clause of option were so worded as to be confined to the purchaser individually.

Where a defective title was not made good until after the purchaser's death, though the defect might have been remedied in his lifetime, his real representative was held entitled to have the purchase-money paid out of the personal estate (*e*); so, where the owner of a piece of land contracted with a builder for the erection of a house upon it, but died intestate before it was completed, his heir was held entitled to have the house completed at the expense of the personal estate; even though the contract was not enforceable in Equity (*f*).

(*d*) *Green* v. *Smith*, 1 Atk. 573; *Broome* v. *Monck*, 10 V. 597; *Collier* v. *Jenkins*, You. 295; Sug. 193. But the devisee of an estate not contracted for, but only directed by the will to be purchased, is entitled, if the purchase cannot be effected, to have the money which the testator so appropriated laid out in the purchase of another estate; see *Coventry* v. *Coventry*, 2 Atk. pp. 366, 369; *Broome* v. *Monck*, 10 V. 602; *Re Adams and Kensington Vestry*, 27 Ch. D. 394.

(*e*) *Garnett* v. *Acton*, 28 B. 333.

(*f*) *Cooper* v. *Jarman*, 3 Eq. 98. See *Brace* v. *Wehnert*, 25 B. 348. See as to costs of carrying out agreement for partition on the death of a co-owner, *Re Tann*, 7 Eq. 434; and as to building contracts, and whether they are enforceable in Equity, *vide post*, p. 1108 *et seq.*

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Relative rights of heir and devisee under old law.

The relative rights of the heir and devisee of the purchaser, in cases falling within the old law, seem to depend on the following rules :—

Right of devisee depended upon contract being binding on vendor.

A purchaser, upon entering into the contract, became entitled to dispose, by will, of all his rights under it (*g*). If, however, the contract were not, at the date of the will, binding upon the vendor, (either absolutely or subject to a condition or option subsequently fulfilled or declared,) it conferred on the purchaser *no* enforceable rights; and his will was therefore inoperative: and any interest subsequently acquired by him in the property descended on his heir (*h*). A clear indication, however, of the testator's intention that the devisee should take, either the particular lands, or, generally, all subsequently purchased lands, was sufficient to put the heir to his election between the descended land and any provision made for him by the will (*i*): and this even as regards a will coming into operation before the 3 & 4 Will. IV. c. 106, s. 3; although in such a case the heir in fact took by descent and not by devise (*k*). If, however, at the date of the will, the contract were binding as against the vendor, the purchaser's devisee became entitled to the benefit of it (if remaining unperformed at the purchaser's decease); but his right to have the purchase-money paid out of the personal estate, depended, as above shown, upon the question whether the contract were binding as against the purchaser at his decease; and, if this were so, it is conceived that the devisee would (as against the heir) be entitled, although the contract were not binding upon the purchaser at the date of the will. If the contract were performed by the vendor in the purchaser's lifetime by a conveyance to the latter in fee (*l*), or to a trustee for

But will might put him to his election.

Devisee might be entitled to estate, but have to pay for it.

Cases in which conveyance to purchaser revoked devise.

(*g*) *Atcherley* v. *Vernon*, 10 Mod. 518, 528, *Broome* v. *Monck*, *ubi supra*; *Rose* v. *Cunynghame*, 11 V. 550; *Gasharth* v. *Lord Lowther*, 12 V. 107; Sug. 183, 184; *Morgan* v. *Holford*, 1 S. & G. 101.

(*h*) *Rose* v. *Cunynghame*, *ubi supra*; *Duckle* v. *Barnes*, 8 Si. 525.

(*i*) *Thellusson* v. *Woodford*, 13 V. 209; *Churchman* v. *Ireland*, 4 Si. 520; 1 R. & M. 250; but the legatees have no lien on the land for such part of the personalty as he improperly receives; *Greenwood* v. *Penny*, 12 B. 403.

(*k*) *Schroder* v *Schroder*, Kay, 578; affd 3 Eq. R. 97.

(*l*) See *Parsons* v. *Freeman*, 3 Atk. 741, 749; *Harmood* v. *Oglander*, 8 V. 106, 127.

him (*m*), (or, perhaps, to the common uses to bar dower in his favour, in cases where the contract was for a conveyance to him or such uses as he should appoint (*n*),) the devisee was entitled in Equity; and the legal estate descended to the heir as his trustee. A conveyance to uses to bar dower, operated, however, as a revocation where there was either no written agreement (*o*), or an agreement to convey in fee (*p*), or even an agreement to convey to the purchaser, his heirs, *appointees* or assigns (*q*): the doctrine, however, is disapproved of by Lord St. Leonards (*r*), and although apparently well settled (*s*), seems open to much observation.

Effect of general devise.

Lands merely contracted for, might pass, along with lands contracted for and conveyed under a general devise of all lands purchased by the testator (*t*); and lands recently purchased and conveyed, passed under a general devise of lands contracted for (*u*); and copyholds surrendered to the use of the copyholder's will, passed under a general devise of copyhold estates contained in a prior will and not subsequently republished (*x*).

Republication.

The execution, according to the Statute of Frauds, of a subsequent codicil (*y*), although purporting to deal only with personal estate, was a republication of a prior will (*z*); and a will spoke, for general purposes, from its last republication (*a*): not so as to alter the meaning of expressions evidently re-

(*m*) See *Jenkinson* v. *Watts*, Lofft, 609, 615; *Rose* v. *Cunynghame*, 11 V. 554.

(*n*) Sug. 183.

(*o*) *Ward* v. *Moore*, 4 Mad. 368; *Plowden* v. *Hyde*, 2 Sr. N. S. 171; revd on another point, 2 D. M. & G. 684.

(*p*) *Rawlins* v. *Burgis*, 2 V. & B. 382.

(*q*) *Bullin* v. *Fletcher*, 2 M. & C. 432.

(*r*) Sug. 183, 184; *Poole* v. *Coates*, 2 D. & War. 497.

(*s*) "I cannot say I see anything like a doubt on the authorities." *Per* Lord Cottenham, 2 M. & C. 441; *Schroder* v. *Schroder*, Kay, 578.

(*t*) *Atcherley* v. *Vernon*, 10 Mod. 526; *Marston* v. *Roe*, 8 A. & E. 16, 63, and cases cited.

(*u*) *St. John* v. *Bishop of Winton*, Cowp. 94.

(*x*) *A.-G.* v. *Vigor*, 8 V. 256; see now 1 V. c 26.

(*y*) *Atcherley* v. *Vernon*, 10 Mod. 518; Com. 381.

(*z*) *Barnes* v. *Crowe*, 1 V. 486; *Pigott* v. *Waller*, 7 V. 98; *Guest* v. *Willasey*, 12 Mo. 2; but see *Jouett* v. *Board*, 12 Jur. 933.

(*a*) *Guest* v *Willasey*, 12 Mo. 2; *Hulme* v. *Heygate*, 1 Mer. 285; *Rowley* v. *Eyton*, 2 Mer. 128; *Goodtitle* v. *Meredith*, 2 M. & S. 5, 14.

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ferring to the original date or devise (*b*); but so as to extend a general devise of all lands within a specified locality, to lands subsequently purchased within the same locality (*c*).

Effect of 1 Vict. c. 26, on relative rights of heir and devisee of purchaser.

In cases of wills falling within the operation of the late Act, the above questions between the heir and devisee are settled in favour of the latter, by the provision which makes the devise operate upon the testator's interests as they exist at the time of his death (*d*).

Where specific description is applicable at date of death, but not at date of will.

It has, however, been held that property will not, by virtue of the Act, pass under words of specific description, which, though applicable at the death, were inapplicable at the date of the will (*e*); thus a devise in 1844 of "all my Quendon Hall estates in Essex" (parol evidence being admitted to show what was comprehended in that description at the date of the will), was held insufficient to pass certain small additions to the property, which had been contracted for, but not actually purchased (*f*): but where there was a specific devise of "my mansion and estate called Cleeve Court," followed by a residuary devise, and the testator at the date of his will had contracted to buy an adjoining estate which was afterwards conveyed to him, and he subsequently bought other small properties, it was held by V.-C. Malins (parol evidence being admitted to show what was comprehended in the description at the date of the will and the death), that the subsequently acquired properties passed under the specific devise (*g*); so, where there was a specific devise of "all

(*b*) *Strathmore* v. *Bowes*, 7 T. R. 482; *Monypenny* v. *Bristow*, 2 R. & M. 117; *Ashley* v. *Waugh*, 4 Jur. 572; *Hughes* v. *Turner*, 3 M. & K. 666; see *Yarnold* v. *Wallis*, 4 Y. & C. 160; *Doe* v. *Walker*, 12 M. & W. 591, 601; *Doe* v. *Hole*, 15 Jur. 13; 20 L. J. Q. B. 57; *Stilwell* v. *Mellersh*, 20 L. J. Ch. 356, 361.

(*c*) *Barnes* v. *Crowe*, 1 V. 486.

(*d*) 1 V. c. 26, s. 24.

(*e*) *Emuss* v. *Smith*, 2 De G. & S. 722; and see *Cole* v. *Scott*, 1 M. & G. 518; *Douglas* v. *Douglas*, Kay, 400; *O'Toole* v. *Browne*, 3 E. & B. 572; but see *Wagstaff* v. *Wagstaff*, 8 Eq. 229; and, as to republication, s. 34; and *Wilson* v. *Eden*, 5 Ex. 752, 766.

(*f*) *Webb* v. *Byng*, 1 K. & J. 580, *sed quære*.

(*g*) *Castle* v. *Fox*, 11 Eq. 542; and see the V.-C.'s comments on *Cole* v. *Scott*, and *Corble* v. *Byng*.

my messuage partly freehold and partly leasehold, No. 3, C. Street," followed by a residuary devise, and the testator subsequently purchased the reversion in fee of the leasehold portion, it was held that the whole messuage passed by the specific devise (*h*); and the use of the pronoun "my," in the description of the thing given, is not sufficient evidence of an intention that the will shall not speak as from the date of the death (*i*): nor, in the case of a residuary gift, does the adverb "now" always have that effect (*k*). In a recent case a testator devised "my cottage and all my land at S.," subject to a condition that the plantations, heather, and furze should be all preserved "in their present state," and devised "all other my freehold manor, messuages, land, and real estate whatsoever and wheresoever," to trustees upon trust for sale. At the date of his will he had a small cottage with twenty-two acres of rough land held with it at S., and he afterwards entered into a contract, which was not completed at his death, to buy a large house with ten acres of garden and land adjoining the cottage and rough land. It was held that, although there was not evidence of a contrary intention within the meaning of the 24th section, yet that, having regard to the existing circumstances at the testator's death and to the residuary devise, the specific devise referred to the cottage and rough land, and did not carry the property contracted to be bought (*l*).

Contract not presumed as against heir.

Where a will, under the old law, bore date only a few days before the conveyance, the Court refused to presume the existence of a binding contract prior to the will, even although for a long period no claim had been made by the heir (*m*).

(*h*) *Miles* v. *Miles*, 1 Eq. 462; *Cox* v. *Bennett*, 6 Eq. 422; *Saxton* v. *Saxton*, 13 Ch. D. 359; and see *Hibon* v. *Hibon*, 9 Jur. N. S. 511; *Re M. R. Co.*, 34 B. 525.

(*i*) *Miles* v. *Miles*, *suprà*. As to a residuary devise being still specific as under the old law with reference to the payment of debts, see *Hensman* v. *Fryer*, 3 Ch. 420; *Gibbins* v. *Eyden*, 7 Eq 371; *Lancefield* v. *Iggulden*, 10 Ch. 136; *Tompkins* v. *Coulthurst*, 1 Ch. D. 626; *Farquharson* v. *Floyer*, 3 Ch. D. 109; and see *post*, p. 702, n. (*s*).

(*k*) *Wagstaff* v. *Wagstaff*, 8 Eq. 229; and see *Re M. R. Co.*, 34 B. 527.

(*l*) *Re Portal and Lamb*, 30 Ch. D. 50.

(*m*) *Cathrow* v. *Eade*, 4 De G. & S. 527.

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Effect, under old law, of purchase of fee by termor;

Under the old law, upon a binding contract for purchase of the inheritance by a person possessed of a beneficial term for years, the term, although specifically bequeathed by a prior will, became attendant on the inheritance; so that, on the death of the purchaser, even before conveyance, his legatee of the term was merely a trustee for his heir (*n*): the intervention, however, of any intermediate estate, unless held in trust for the purchaser (*o*), would seem to prevent the operation of the rule (*p*): and the rule that the term became attendant was merely one of presumption, which might be rebutted by evidence of a contrary parol declaration by the purchaser (*q*).

and under 1 Vict. c. 26.

It seems probable that, in cases governed by the new law, a contract for purchase, not completed by conveyance, would, in Equity, defeat (as before) the rights of a party claiming the term under a general bequest; but would not (except in cases coming within the operation of the 8 & 9 Vict. c. 112) affect a specific legatee of the term: and it would seem that a specific legatee will not lose the benefit of the bequest, if the term is actually merged by a conveyance of the fee to the testator, or becomes attendant on the inheritance, or satisfied and merged under the Satisfied Terms Act (*r*).

Merger when not presumed.

It need scarcely be observed, that where there is an evident intention that the term shall be kept on foot, there is no presumption of merger: as where the owner in fee purchases an existing lease, and has it assigned in trust for him, his *executors, administrators, and assigns* (*s*); or, where the owner of the leasehold interest, on purchasing the reversion, takes the conveyance in the name of a trustee, and expressly declares that the term shall not merge (*t*). Where the husband is entitled in fee, and the term comes to the wife, there was,

(*n*) *Galton* v. *Hancock*, 2 Atk. 425; *Capel* v. *Girdler*, 9 V. 509.

(*o*) *Whitchurch* v. *Whitchurch*, 2 P. W. 236.

(*p*) *Scott* v. *Fenhoullet*, 1 Br. C. C. 69; *Capel* v. *Girdler*, 9 Ves. 509.

(*q*) Sug. 625.

(*r*) 8 & 9 V. c. 112; *Miles* v. *Miles*, 1 Eq. 462; *Saxton* v. *Saxton*, 13 Ch. D. 359.

(*s*) *Gunter* v. *Gunter*, 23 B. 571; *Tyrrwhitt* v. *Tyrrwhitt*, 32 B. 244; but see Sug. 625.

(*t*) *Belaney* v. *Belaney*, 2 Ch. 138.

under the old law, no merger during the wife's life (*u*), and the question cannot now arise.

Section 7.

(7.) *As to the effect of the contract in various special cases.*

As to the effect of the contract in various special cases.

Mortgagee contracting to purchase may enforce his legal title.

If a mortgagee, having agreed to purchase the equity of redemption, proceed to enforce his legal title by ejectment, the existence of the contract will, unless he have improperly delayed to enforce it (*x*), be a ground for refusing relief to the mortgagor under the 7 Geo. II. c. 20 (*y*).

Contract for sale by mortgagee under power.

It has been held, that the fact of a mortgagee, with power of sale, having contracted to sell part of the mortgaged estate for a sum exceeding the amount due on the security, is no ground for restraining him from bringing an action for recovery of the mortgage debt (*z*).

Agreement by lessee.

An agreement by A., a tenant in possession, to purchase of B., is a sufficient *primâ facie* evidence of B.'s title to enable him, if the contract have gone off, to sustain an action of ejectment (*a*).

Agreement for purchase of lease, and possession taken.

Where the assignee of a lease agreed to sell it, and it was stipulated that the purchaser should not be entitled to an assignment, and he entered and retained possession until the end of the term, the latter was held bound, in Equity, to indemnify the original lessee, although no party to the agreement, against breaches of covenant committed during such possession (*b*).

Liability of equitable assignee of a lease.

A person who has become the equitable owner of a lease, by contract between himself and the lessee, but to whom no

(*u*) *Jones* v. *Davies*, 8 Jur. N. S. 592.

(*x*) *Skinner* v. *Stacey*, 1 Wils. 80.

(*y*) *Goodtitle* v. *Pope*, 7 T. R. 185.

(*z*) *Willes* v. *Levett*, 1 De G. & S. 392.

(*a*) *Doe* v. *Burton*, 16 Q. B. 807.

(*b*) *Close* v. *Wilberforce*, 1 B. 112; see *Sanders* v. *Benson*, 4 B. 350; and *Moore* v. *Greg*, 2 Ph. 717, 721, 725. For the legal liability of which this principle is the equitable counterpart, see *Moule* v. *Garrett*, L. R. 5 Ex. 132; 7 Ex. 101.

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legal assignment has been executed, is not liable to the lessor for rent accrued, or breaches of covenant committed, during the time when he was in possession (*c*). The decision in this case was rested on the general ground that the relation of landlord and tenant was a purely legal one; and the circumstance that the equitable assignee had parted with the property does not appear to have been considered material.

Agreement by lessor for purchase of underlease.

Where a lessor becomes the equitable assignee of an underlease, he incurs, in Equity, the obligation of performing the covenants therein contained; and cannot set up their non-performance as a ground for refusing performance of a covenant in the original lease (*d*).

Joint tenancy.

A contract for sale by a joint-tenant seems to be, in Equity, a severance of the joint-tenancy (*e*).

Co-ownership of a common right.

The co-ownership of a common right, as *e.g.*, of fishing on a lake, is not a *jus individuum*, even where merely appurtenant to land; but any one of the joint owners may alien his right, either wholly or in part, though not so as to prejudice the enjoyment of his co-owners (*f*).

Dower.

A contract for sale by a single man, was, in cases subject to the old law of dower, sufficient in Equity to exclude the claim to dower of a wife whom he married before the conveyance (*g*). Whether the contract by a mortgagee in fee for the purchase of the equity of redemption let in his wife's dower, seems to be somewhat doubtful (*h*): but such a con-

Under old law.

(*c*) *Cox* v. *Bishop*, 8 D. M. & G. 815; see judgment; cf. *Wright* v. *Pitt*, 12 Eq 408, case of mining lease to trustees for a public company which repudiated the lease, but was nevertheless held liable in Equity to the lessor.

(*d*) *Jenkins* v. *Portman*, 1 Ke. 435; and see *Cox* v. *Bishop*, 8 D. M. & G. 819; *Nokes* v. *Gibbon*, 3 Dr. 681.

(*e*) *Brown* v. *Randle*, 3 V. 256, 257; *Frewen* v. *Relfe*, 2 Br. C. C. 220, 224; *Kingsford* v. *Ball*, 2 Gif. *App.* 1.

(*f*) *Menzies* v *Macdonald*, 2 Jur. N. S. 575.

(*g*) *Lloyd* v. *Lloyd*, 2 Con. & L. 592.

(*h*) See and consider *Knight* v. *Frampton*, 4 B. 10; and *Flack* v. *Longmate*, 8 B. 420.

tract does not appear to merge the security as in favour of mesne incumbrancers (*i*).

In one case, where the purchaser elected to take the estate with a compensation, specific performance of the contract was enforced against a vendor, whose wife, entitled under the old law, refused to release her right of dower (*k*).

Under new law.

Under the new law (*l*), the contract for purchase lets in the dower of the purchaser's wife; but she may be deprived of it in any of the various ways specified in the Act (*m*): as regards copyholds, the right to freebench does not attach until actual admittance (*n*). On the other hand, the contract for sale binds the dower of the vendor's wife, unless he have before marriage agreed not to bar her dower (*o*).

Legacy duty.

It has been thought that in the case of a mere power of sale under a will, where the proceeds of sale are to remain personal estate, the contract would let in the Crown's claim to legacy duty (*p*): but according to a modern decision of the House of Lords this is so only when the power is so worded as, in the events which occur, to be in effect equivalent to a trust; and a mere discretionary power of conversion for the convenience or benefit of the parties beneficially interested, does not let in the duty, although a sale be actually effected (*q*). So, where the proceeds are to be reinvested in land, so that the property, although in fact converted, will remain land in contemplation of a Court of Equity, it has been decided that no duty attaches, although a sale be actually effected, and the

(*i*) *Bailey* v. *Richardson*, 9 Ha. 734; see *post*, p. 1010 *et seq.*

(*k*) *Wilson* v. *Williams*, 3 Jur. N. S. 810.

(*l*) 3 & 4 Will. IV. c. 105, which affects only women married after January 1st, 1834 (s. 14), and does not affect freebench.

(*m*) Sects. 2 to 10; see sect. 11.

(*n*) *Smith* v. *Adams*, 5 D. M. & G. 712; but see *Spyer* v. *Hyatt*, 20 B. 621, where the intestate appears not to have been admitted.

(*o*) Sect. 11.

(*p*) See *A.-G.* v. *Simcox*, 1 Ex. 749; and see *A.-G.* v. *Metcalfe*, 6 Ex. 43; and *A.-G.* v. *Mangles*, 5 M. & W. 120.

(*q*) *Adv.-G.* v. *Smith*, 1 Macq. 760. And see the authorities collected and discussed in Hanson, pp. 20 and 212.

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will contain a power of interim investment in the funds or on mortgage, and the parties elect to take the property as money (*r*). And, on the other hand, an absolute trust for sale, although not acted on, lets in the duty (*s*): the test of liability being the equitable nature of the property at the time of the death. It has been held, that where a will contains a discretionary power of sale, and a sale is made by the Court, the question of liability depends upon whether the Court acted by directing the trustees to exercise their discretionary power, or sold under its own general jurisdiction (*t*); the duty not attaching in the latter case: but, as we have seen (*u*), the present doctrine is, that a mere discretionary power, although acted on, does not let in the claim to duty.

Succession duty.

By the Succession Duty Act (*x*), the duty imposed by the Act is made a first charge on the property; and every person in whom the same is vested by alienation or other derivative title at the time of the succession (*y*) becoming an interest in possession, is personally accountable to the Crown for the duty payable in respect of such succession (*z*): but every receipt and certificate, purporting to be in discharge of the whole duty payable for the time being in respect of any succession or any part thereof, exonerates a *bonâ fide* purchaser for value, and without notice, from such duty, notwithstanding any suppression or misstatement in the account, or any

(*r*) *Heal* v. *Knight*, 8 Ex. 839, n.; *Mules* v. *Jennings*, 8 Ex. 830.

(*s*) *A.-G.* v. *Holford*, 1 Pr. 426; *Williamson* v. *Adv.-G.*, 10 C. & F. 1; and see *A.-G.* v. *Brunning*, 8 H. L. C. 243; and see and dist. *A.-G.* v. *Marquis of Ailesbury*, 16 Q. B. D. 408, where probate duty was held not to be payable in respect of land bought out of the personal estate of a lunatic under an order of the L.JJ. sitting in Lunacy, declaring that such land should be considered as part of the lunatic's personal estate, but not containing any express or implied trust for sale. But this decision has since been reversed by the H. L., 12 Ap. Ca.

(*t*) *Hobson* v. *Neale*, 8 Ex. 368; 17 B. 178.

(*u*) *Ante*, p. 313.

(*x*) 16 & 17 V. c. 51.

(*y*) As to what is a succession, see *Wilcox* v. *Smith*, 4 Dr. 40; *Re Lovelace*, 4 D. & J. 340; *Re Jenkinson*, 24 B. 64. A conveyance by way of *bonâ fide* sale never creates a succession within the meaning of sect. 2; *Fryer* v. *Morland*, 3 Ch. D. 675; *A.-G.* v. *Dowling*, 6 Q. B. D. 177, see also *A.-G.* v. *Noyes*, 8 Q. B. D. 125.

(*z*) See sects. 42, 44.

insufficiency in the assessments; and no *bonâ fide* purchaser for value under a title, not appearing to confer a succession, is subject to any duty which may be chargeable upon the property by reason of any extrinsic circumstances of which he has no notice at the time of his purchase (*a*). In one case, where it was doubtful whether succession duty or legacy duty was payable, a certificate from the Inland Revenue Office that the latter duty had been paid, was held to have discharged the land (*b*). The donee of a general power of appointment under a disposition taking effect upon the death of any person dying after the commencement of the Act is to be deemed entitled, at the time of his exercising such power, to the property or interest thereby appointed as a succession derived from the donor of the power; and the appointee under a limited power of appointment under such a disposition, who takes any property by the exercise of such a power, is to be deemed to take the same as a succession from the person creating the power as predecessor (*c*). The Act does not expressly provide how the succession of an appointee, under a *general* power of appointment, which has taken effect on a death happening after the commencement of the Act, is to be treated as derived; but the Court of Exchequer has held, that in such a case the interest of the appointee is to be taken as derived from the donee of the power (*d*). Consistently with the above-mentioned rules as to legacy duty, the Succession Duty Act provides, that the interest of any successor in moneys to arise from the sale of real property (which includes leaseholds) (*e*) under any trust for the sale thereof, so far as the same are not chargeable under the Legacy Duty Acts, shall be deemed to be personal

On appointment under a general power.

(*a*) Sect. 52.

(*b*) *Earl Howe* v. *Earl of Lichfield*, 2 Ch. 155.

(*c*) Sect. 4; see *Re Lovelace*, 4 D. & J. 340; *Re Wallop's Trust*, 1 D. J. & S. 656; *Charlton* v. *A.-G.*, 4 App. Ca. 427; *A.-G.* v. *Mitchell*, 6 Q. B. D. 548.

(*d*) *A.-G.* v. *Upton*, L. R. 1 Ex. 224, and cases there cited; cf. *Re Barker*, 7 H. & N. 109; *A.-G.* v. *Floyer*, 9 H. L. C. 477; and generally on the Act, see *Ring* v. *Jarman*, 14 Eq. 357; and the comments in that case on *A.-G.* v. *Gell*, 3 H. & C. 615; *Commrs. of I. R.* v. *Harrison*, 7 H. L. 1.

(*e*) See sect. 1; and as to what is included in "property" in sect. 2, see *Re Ogala's Trusts*, 7 Ch D. 351.

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property chargeable with duty under the Succession Duty Act; but, if subject to any trust for the reinvestment thereof, such moneys are to be deemed real property, and chargeable with duty as such (*f*). In the case of settled property, powers of sale, exchange, and partition, whether express or conferred by statute, as in the case of the Settled Land Act, may still be exercised, and the sale moneys or properties received in substitution or severalty become liable to the duty (*g*); and it has even been held that when an estate was settled subject to a jointure (the cesser of which would involve the payment of duty), and with the concurrence of the jointress was sold by the trustees of the settlement in exercise of a power of sale therein contained, the liability to succession duty was shifted from the land to the money; although the power of sale did not override, but was overridden by, the jointure (*h*).

Sales under Settled Estates Act, 1877, and Settled Land Act.

A sale by the Court under the Settled Estates Act, 1877, is equivalent to a sale under a power in the settlement, and the duty is transferred to the purchase-money (*i*); and it is conceived that the principle will equally apply to a sale under the powers conferred by the Settled Land Act (*k*).

Cases on the Succession duty.

The following points which have arisen on the Act, in addition to those noticed above, are deserving of attention. On the sale of a reversion, or of an estate subject to a periodical charge, the duration of which depends upon a life or lives, the purchaser is, as between himself and the vendor, liable to bear the duty, unless there is an express stipulation to the contrary in the contract (*l*). In the decided case, the vendor was a trustee with power of sale; but the decision was based on the general ground that the purchaser had bought the right to succeed on the death of the tenant for life, and that this carried with it the tax on the succession.

(*f*) Sects. 29, 30.
(*g*) Sect. 42.
(*h*) *Dugdale* v *Meadows*, 6 Ch. 501.
(*i*) *Re Warner's S. E.*, 17 Ch. D. 711.
(*k*) Sect. 20; see *post*, p. 669.
(*l*) *Cooper* v. *Trewby*, 28 B. 194.

On sale by tenant for life and remainderman.

In the common case of a tenant for life and remainderman conveying the property in fee, it remains liable in the hands of the purchaser to the payment of the duty on the death of the tenant for life. The Act, however, gives the commissioners a discretionary power to commute the duty (*m*); and the purchaser should either see that this is done before the completion of his purchase, or insist on a sufficient indemnity from the remaindermen or reversioners. As between themselves and the purchaser, the liability of these parties to commute the duty would seem to depend upon whether the purchaser bought with notice of the state of the title being such as would *primâ facie* involve the liability to the duty. If a tenant in tail in remainder bars the entail, and re-settles the property in his own favour, he must, on the death of the tenant for life, pay the same duty as if he had taken under the original settlement; but if, on disentailing the property, he absolutely alienates it, the liability is shifted on to his purchaser (*n*). The appointee under a general power of appointment contained in a British settlement, which is exercised by will, is liable to the duty, notwithstanding the foreign domicile of the donee of the power (*o*); but neither legacy duty nor succession duty is in the first instance payable in respect of legacies given by the will of a person domiciled abroad (*p*); the distinction being that in the former case the appointee takes by virtue of a settlement which must be governed by English law, while in the latter case the legatees derive their title solely under the foreign will. Succession duty is payable on real estate in

(*m*) Sect. 41. Upon the subject of commutation, see *Re Cooper and Allen's Contract*, 4 Ch. D. 802.

(*n*) *Braybrooke* v. *A.-G.*, 9 H. L. C. 150. As to the case of the reservation of an annuity to a tenant in tail on a resettlement during the life of the tenant for life, and the succession duty payable on the death of the latter, see *Commrs. of I. R.* v. *Harrison*, L. R. 7 H. L. 1; *Le Marchant* v. *Commrs. of I. R.*, 1 Ex. D. 185.

(*o*) *Re Lovelace*, 4 D. & J. 340; *Re Wallop's Trust*, 1 D. J. & S. 656; *Re Capdevielle*, 2 H. & C. 985; *Re Badart's Trusts*, 10 Eq. 288.

(*p*) *Wallace* v. *A.-G.*, 1 Ch. 1; but see comments on this case in *A.-G.* v. *Campbell*, L. R. 5 H. L. 524; and see this case also as to the liability to duty in respect of any devolution of the property after the purposes of administration have been satisfied, and the fund has been invested in this country; see also on the Act, *A.-G.* v. *Littledale*, *ibid.* 290.

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England by a testator having a foreign domicile (*q*). For the purposes of taxation, the value of the property is to be ascertained at the time when the interest of the successor accrues; so that if it has then no saleable, or actual or potential annual value, it is incapable of assessment under the Act (*r*); and the beneficial enjoyment mentioned in the 21st section, is the enjoyment of the possessor in his own right, and for his own benefit, and not as trustee for another (*s*).

On extinction of charges.

Duty is payable in respect of the increase of benefit arising from the determination or extinction of any charge, estate, or interest on or in land which is determinable by the death of the chargee, or at any period ascertainable only by reference to that event (*t*).

(*q*) *Atkinson* v. *Anderson*, 21 Ch. D. 100.

(*r*) *A.-G.* v. *Earl of Sefton*, 11 H. L. C. 257.

(*s*) *Ib.*; and see generally on the Act cases above cited, and *Re Micklethwaite*, 11 Ex. 452; *Re Peyton*, 7 H. & N. 265; *A.-G.* v. *Floyer*, 7 H. & N. 238; *Re Ramsay*, 30 B. 75, *Oldfield* v. *Preston*, 8 Jur. N. S. 107, *Re De Lancey*, L. R. 4 Ex. 345, and see 24 & 25 V. c. 92, and 28 & 29 V. c. 104.

(*t*) Sect. 5, see *Harding* v. *Harding*, 2 Giff. 597, *Wilcox* v. *Smith*, 4 Dr. 55, Hanson, p. 261.

CHAPTER VIII.

AS TO THE ABSTRACT.

1. *General matters relating to the abstract.*
2. *When perfect;—what it must contain and show.*
3. *What should be furnished, in various specified cases.*
4. *As to its preparation, contents, and delivery.*
5. *As to its examination and perusal.*
6. *As to its verification.*

Section 1.

General matters relating to the abstract.

Purchaser's right to abstract.

His right to retain.

Must be given up, if contract abandoned.

(1.) A PURCHASER may require to be furnished with an abstract prepared in the usual way (*a*); even although he have agreed to accept the title (*b*): he may retain it, during negotiations upon, and even after rejection of, the title, until the dispute be finally settled, for the purpose of showing the grounds of such rejection (*c*); and, in the interim, he may maintain trover for it, even against the vendor (*d*): but when the contract is finally abandoned by both parties, he must return the abstract, and may not retain any copy of it (*e*): counsel's opinion and observations he may, it appears, retain if written upon separate paper (*f*); or, if written upon the abstract itself, he may erase them before returning it (*g*).

Where he buys a mere contract for sale.

But the purchaser of a mere contract for sale is not entitled to require his immediate vendor to show the original vendor's title (*h*); as the subject-matter of the subsale is,

(*a*) *Horne* v. *Wingfield*, 3 Sc. N. R. 340; Sug. 406.

(*b*) *Morris* v. *Kearsley*, 2 Y. & C. 139; *Keyse* v. *Hayden*, 20 L. T. O. S. 244.

(*c*) 2 Taunt. 278; Sug 428.

(*d*) *Roberts* v. *Wyatt*, 2 Taunt. 268; but see *Langslow* v. *Cox*, 1 Chit. 98.

(*e*) 2 Taunt. 277.

(*f*) 2 Taunt. 270; but see Sug. 428, and *Alexander* v. *Crosbie*, 2 Ir. Eq. R. 141; a decision referable to the passage in the treatise, see 143.

(*g*) *Wood* v. *Court*, 2 S. Atk. Conv. 463.

(*h*) *Kintrea* v. *Preston*, 1 H. & N. 357, where the contract was for a lease; and see *Phipps* v. *Child*, 3 Dr. 709.

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not the property itself, but the rights therein of the original purchaser under the original contract. Whether the owner of a moiety of an estate to whom is given the right of pre-emption over the other moiety, can insist on having an abstract of the common title, has been doubted (*i*): but in the ordinary case of a surviving partner purchasing the share of his deceased partner, a stipulation that the vendor shall deliver an "abstract of their title" has been held to mean an abstract of the general title (*k*).

Vendor pays for.

Except on sales to railway company, &c.

The vendor, as a general rule, pays for the abstract (*l*); but on sales to a company under the provisions of the Lands Clauses Consolidation Act, 1845, whether such sales be voluntary or compulsory, and whether made by absolute or merely limited owners, the costs of the abstract (in the absence of agreement) are thrown on the company (*m*): and similar provisions (*n*) are contained in most of the earlier railway and other similar Acts: such costs seem to be included in any general stipulation throwing on the purchaser the costs of *the contract* (*o*).

Copy abstract.

A solicitor, who merely furnishes a copy of a former abstract, is not justified in making the usual charge for preparing an abstract *de novo* (*p*): cases, however, may often occur in which the adaptation of an old abstract to the existing circumstances of the sale may require so much skill and labour as to justify more than a mere charge for a stationer's copy, although the actual alterations may not be considerable, if estimated by their length in folios.

(*i*) See and consider *Brooke* v. *Garrod*, 2 D. & J. 62.

(*k*) *Morris* v. *Kearsley*, 2 Y. & C. 139.

(*l*) Sug. 406.

(*m*) 8 & 9 V. c. 18, s. 82.

(*n*) See *Re London and Greenwich R. Co.*, 3 Ha. 22.

(*o*) See *Ex p. Addie's Charity*, 3 Ha. 22, 25; and see *post*, pp. 803, 804.

(*p*) *M'Culloch* v. *Gregory*, 1 K. & J. 291. It is conceived the scale prescribed by Schedule I. to the rules under the Solicitors Remuneration Act, 1881, applies in such a case; but not where no abstract is furnished. See *Re Lacey*, 25 Ch. D. 301; and see *Re Sec. of State for War and Denne*, 33 W. R. 120; *Ex p. Mayor of London*, 34 Ch. D. 452.

(2.) *As to when the abstract is perfect;—what it must contain and show.*

As to when the abstract is perfect; what it must contain and show.

For the purpose of conditions, &c., as to time, an abstract is said to be "perfect," if it be as perfect an abstract as the vendor is able to furnish at the time of delivery (*q*); although the title shown by it may be defective. An abstract is, in the stricter sense of the term, "perfect" or complete, when it shows a perfect title (*r*); that is, when it shows that the vendor is either himself competent to convey to, or can otherwise procure to be vested in, the purchaser, the legal and equitable estates free from incumbrances (*s*). If, on the face of the abstract delivered, the vendor has shown, say a sixty, or in the case of a contract entered into since 1874, a forty, years' title (*t*), and if for the purpose of supporting that title, it is necessary to show that a person died intestate, or any other fact—if the facts are alleged with sufficient specification on the abstract—then it *shows* a good title, although the proof of the matters shown may be the subject of ulterior investigation (*u*).

When "perfect," within meaning of conditions of sale.

When "perfect," as showing a sufficient title.

V.-C. Kindersley's definition of a "perfect" abstract.

Certain imperfections in, not considered defects of title.

For instance, the non-registration of deeds, which can be registered (*x*), the existence of incumbrances, when the incumbrancers can be compelled to receive their money and join in the conveyance (*y*), the outstanding of the legal estate in a trustee (*z*), or in a married woman whose interest is bound by an order of the Court (*a*), are not, at least in

(*q*) *Morley* v. *Cook*, 2 Ha. 111; and see, at law, *Blackburn* v *Smith*, 2 Ex. 783; *Steer* v. *Crouley*, 11 W. R. 861; *Gray* v. *Fowler*, L. R. 8 Ex. 249, 279, in which the passage in the text was approved in the judgment; *Burnaby* v. *Equit. Rev. Society*, 54 L. J. Ch. 466, 472.

(*r*) 2 Ha. 111; Sug. 427.

(*s*) See and consider *Lord Braybrooke* v. *Inskip*, 8 V. 436; *Boehm* v. *Wood*, 1 J. & W. 419, 421; *Jumpson* v. *Pitchers*, 1 Coll. 13, 15; Sug. 423.

(*t*) See 37 & 38 V. c. 78, s. 1.

(*u*) Per V.-C. Kindersley, in *Parr* v. *Lovegrove*, 4 Dr. 177; and see *Oakden* v. *Pike*, 13 W. R. 673; and see also *Steer* v. *Crouley*, 11 W. R. 861.

(*x*) *Stowell* v. *Robinson*, 3 Bing. N. C. 928, 935.

(*y*) *Townsend* v. *Champernown*, 1 Y. & J. 449; and see 2 Moll. 583; but not if their concurrence cannot be compelled; see *Page* v. *Adam*, 4 B. 269; Sug. 425.

(*z*) *Berkeley* v. *Dauh*, 16 V. 380; *Sellick* v *Trevor*, 11 M. & W. 728.

(*a*) *Jumpson* v. *Pitchers*, 1 Coll. 13.

a Court of Equity (*b*), regarded as imperfections of title; so if, on the completion of a contract entered into since 1874, the purchaser will have an equitable right to the production (*c*) of the deeds, the inability of the vendor to furnish a legal covenant for their production is no objection to the title at Law or in Equity.

Title defective where no discharge can be given for purchase-money.

But, consistently with the terms of the above proposition, where vendors cannot give to or procure for the purchaser a valid discharge for the purchase-money, the title is defective (*d*).

Should state written consent of parties agreeing to join in sale.

And the mere statement on the face of the abstract that a party who is not compellable has agreed to join, although usual, is, it is submitted, insufficient; and, in Equity, the fact of a third party, whose concurrence is necessary, being under no legal or equitable obligation to join in the sale, has been held to be an objection, not merely of conveyance, but of title (*e*). A written agreement to concur, enforceable against the party, as being founded on a valuable consideration, should, in strictness, be procured and abstracted (*f*): nor is such agreement sufficient, if it do not absolutely bind the interest of the party signing it; *e. g.*, a title dependent on an agreement by a tenant in tail to bar his estate tail, would be imperfect (*g*); so, also, would be a mere agreement by a married woman, with or without her husband, to concur in respect of her interest in real estate not settled to her separate use, and over which she has no general power of appointment.

And this is not always sufficient.

Must show where outstanding legal estate is vested.

So, if the legal estate be outstanding, the abstract must show in whom it is vested (*h*); or that the vendor can get it

(*b*) But see, at Law, *Hanslip* v. *Padwick*, 5 Ex. 622, 623.

(*c*) 37 & 38 V. c. 78, s. 2, sub-s. 3.

(*d*) *Forbes* v. *Peacock*, 12 Si. 528.

(*e*) *Esdaile* v. *Stephenson*, 6 Mad. 366; and see *Douglas* v. *L. & N. W. R. Co.*, 3 K. & J. 181.

(*f*) See *Nock* v. *Newman*, *post*, p. 1179; *Phillips* v. *Edwards*, 33 B. 440.

(*g*) *Lewin* v. *Guest*, 1 Rus. 325; 3 & 4 Will. IV. c. 74, s. 47; and see *post*, p. 1117, n. (*c*).

(*h*) *Wynne* v. *Griffith*, 1 Rus. 283.

in; but when it is shown that the legal estate can be got in, the abstract is perfect (*i*).

Must show that land-tax has been redeemed where the estate is sold free from the tax.

Where an estate is sold free from land-tax, the abstract should set out the certificate of redemption, unless there is a condition binding the purchaser to accept less conclusive evidence (*k*). The existence of land-tax, or insufficient proof that it has been redeemed, renders the title defective, if the estate is sold free from the tax (*l*). Where the estate is sold subject to the tax, its existence need not be mentioned; though it is usual and convenient to specify the amount in the particulars: a statement so made must of course be verified. Where it is sold free from tithe, the ground of exemption from tithe must be shown by the abstract.

Showing future right to property, insufficient at Law: *semble*.

As in case of mortgage which cannot be discharged.

The expression used by Lord Eldon (*m*) is, that the abstract is complete, "whenever it appears that, upon certain acts done, the legal and equitable estates will be in the purchaser:" it was, however, suggested in the first two editions of this work that, at least in a Court of Law, it would not be sufficient for the abstract to show merely a future (although certain and early) right to the property; and that the existence of an incumbrance which cannot be discharged on or before the time fixed for completion (*n*), would amount at Law to a defect of title (*o*): but in a modern case, where the vendor, who was not bound to convey the estate by any

(*i*) *Camberwell Building Society* v. *Holloway*, 13 Ch. D. 754, 763; *Kitchen* v. *Palmer*, 46 L. J. Ch. 611; and see *Aiam* v. *Brown*, 14 Sj. 303.

(*k*) As, *e. g.*, a copy of the register, or a statutory declaration that the tax has not been paid for a certain number of years.

(*l*) *Buchanan* v. *Poppleton*, 4 C. B. N. S. 40.

(*m*) *Lord Braybrooke* v. *Inskip*, 8 Ves. 436. See also the judgment of Jessel, M. R., in *Camberwell Building Society* v. *Holloway*, 13 Ch. D. 763.

(*n*) See (a case depending on the speciality of the contract) *Forster* v. *Hoggart*, 15 Q. B. 155. A mortgagee, we may remark, need not receive his money before the day fixed for redemption, although previously tendered with interest up to such day; *Brown* v. *Cole*, 14 Sj. 427. It must, however, be observed, that since the Judicature Acts time is not of the essence of the contract at Law when it is not so in Equity; 36 & 37 V. c. 66, s. 25 (7).

(*o*) See *Hanslip* v. *Padwick*, 5 Ex. 615, and compare *Webb* v. *Austin*, 7 Man. & G. 701.

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particular day, deduced a good title to the equity of redemption, the existence of mortgages affecting the property was held not to be a defect of title; although they were not mentioned in the contract, and no notice had been given of the intention to pay them off (*p*). In Equity, as a general rule, mortgages and other incumbrances are considered merely matters of conveyance (*q*): and this doctrine has even been extended to cases where the property was mortgaged to an amount considerably exceeding its value (*r*): they seem, however, to have been decided on the principle that the vendor had the legal power, if he used the necessary means, of procuring a conveyance; and the conclusion would, it is conceived, be different, if, by reason of an agreement for the continuance of the charge, or otherwise, the vendor had no right to call on the incumbrancer to join in the conveyance (*s*). The equitable doctrine as to the consolidation of securities furnishes a strong argument against the obligation of a purchaser to accept the conveyance of a mere equity of redemption instead of an unincumbered estate (*t*). Lord Langdale observes, on the general question, "Where an interest is vested in a party to secure a right, the satisfaction of which right entitles the party who has sold the estate to call for a conveyance, then the Court considers it a question of conveyance only; but I think it has never gone further than that" (*u*): in which it seems to be assumed that the right is capable of being satisfied at the time when the question of title or no title arises. At any rate it may be considered that the title is perfect, whenever it appears that under the contract the purchaser either already has, or will necessarily before the time fixed for completion be able to acquire, an immediate and indisputable right to the legal and equitable estates; even although the

Incumbrances; whether a defect in title in Equity.

Title good, although immediate conveyance not procurable.

(*p*) *Savory* v. *Underwood*, 23 L. T. O. S 141.

(*q*) *Townsend* v. *Champernoun*, 1 Y. & J. 449; *Kitchen* v. *Palmer*, 46 L. J Ch 611.

(*r*) *Stephens* v. *Guppy*, and *Rawson* v *Tasburgh*, cited 1 Y. & J. 450.

(*s*) See 2 Moll. 583, *Page* v. *Adam*, 4 B 269

(*t*) Although the doctrine does not *primâ facie* apply in the case of a mortgage made since the 31st of December, 1881, the operation of the Act in this respect may be, and generally is, excluded, Conv. Act, 1881, s 17, and see *post*, pp. 1036 *et seq.*

(*u*) *Sidebotham* v. *Barrington*, 3 B

absence of parties, or other circumstances, may considerably delay the conveyance (x).

Whether sufficient if abstract merely show that vendor is tenant in tail in possession.

It has, in fact, been held, that the Master, under the old practice, was warranted in finding that a good title was deduced, when it appeared by the abstract that the vendor was tenant in tail in possession, and able to convey the fee simple by an enrolled conveyance (y): this decision, so far as it may tend to establish, for it by no means decides, that such a vendor is not bound at once to execute a disentailing assurance, and limit the fee simple either to his own use or to his appointment, seems open to observation. It is clear that his contract would give to the purchaser no right which he could enforce in the event of the vendor's death before the execution of the conveyance; which sufficiently distinguishes it from the case put by the plaintiff's counsel, of a contract entered into by a tenant for life with a power of sale: for a contract to exercise such a power, if entered into for valuable consideration, would be enforced in Equity against the issue in tail and remaindermen (z): whereas, in the case of the tenant in tail, the jurisdiction of Equity is expressly excluded by statute (a): and it seems unreasonable that a purchaser should be put to the expense of investigating the title and preparing his conveyance, when the death of the vendor would deprive him of the estate, and possibly leave him without available remedy for recovery of his costs, and deposit (if any has been paid). These remarks apply more forcibly where a future day is fixed for completion, before which the vendor is not bound to convey; so that it does not rest with the purchaser to get rid of the state of uncertainty by at once accepting the title and taking a conveyance. In such a case the title deduced is not, it is submitted, with reference to the terms of a

(x) As to when a good title is first shown, see *Sherwin* v. *Shakspear*, 17 B. 267; 5 D. M. & G. 517; *Bridges* v. *Longman*, 24 B. 27; *Parr* v. *Lovegrove*, 4 Dr. 177; *Lyle* v. *Earl of Yarborough*, John. 70.

(y) *Cattell* v. *Corrall*, 4 Y. & C. 228.

(z) Sug. Pow. 557.

(a) 3 & 4 Will. IV. c. 74, s. 47; but see *Bankes* v. *Small*, 35 W. R. 765; and *post*, p. 1117, n. (c).

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contract, stipulating for a conveyance *in futuro*, an absolutely good title; but a title defeasible in the event of the vendor's death before the time fixed for completion.

Section 3.

(3.) *As to what abstract should be furnished in various cases.*

As to what abstract should be furnished in various cases:

On sales in lots.

On a sale of any property in lots, the purchaser of two or more lots held wholly or partly under the same title, has not now a right to more than one abstract of the common title, except at his own expense (*b*).

On purchase by a tenant in common.

If one tenant in common purchase of another, he is entitled to an abstract of their general title, if the vendor stipulates in general terms for the delivery of an abstract (*c*); but, in the absence of such a stipulation, it seems doubtful whether he can require more than an abstract showing his vendor's separate title (*d*).

On purchase of allotments.

Upon the sale of lands allotted under an Inclosure Act, the abstract down to the award must be that of the title to the lands in respect of which the allotment was made (*e*): and when the allotment has been made indiscriminately in respect of lands held under different titles, all such titles must be shown by the abstract (*f*). It may be observed that if the Act omits the usual clause assimilating the tenure, an allotment is freehold; although made in respect of customary lands: and this, notwithstanding the Act directs that allotments shall be held to the same uses, &c., as the lands in respect of which they are allotted (*g*).

Tenure of allotments.

Of land taken in exchange.

Where the estate has been taken in exchange at common law, or under mutual conveyances with eviction clauses, the abstract must, down to the exchange, show the titles to both

(*b*) Conv. Act, 1881, s. 3 (7).

(*c*) *Morris* v. *Kearsley*, 2 Y. & C. 139.

(*d*) *Law* v. *Law*, 9 Jur. 745; and see *Phipps* v. *Child*, 3 Dr. 709; *Brooke* v. *Garrod*, 2 D. & J. 62.

(*e*) Sug. 373.

(*f*) See and consider *King* v. *Moody*, 2 S. & S. 579; *Major* v. *Ward*, 5 Ha. 604.

(*g*) *Doe* v. *Davidson*, 2 M. & S. 175; *Doe* v. *Hillard*, 9 B. & C. 789.

estates (*h*); unless, in the case of a common law exchange (as to the future operation of which see 8 & 9 Vict. c. 106, s. 4), the estate given in exchange has since been aliened (*i*), and the vendor can prove the alienation.

Of land taken in exchange from the Church or under Inclosure Acts.

Where the estate has been taken in exchange under the Acts authorizing the exchange of ecclesiastical property (*k*), or under an Inclosure Act, or the provisions of the 4 & 5 Will. IV. c. 30 (authorizing the exchange of Common Lands), the title down to the exchange must be that of the estate given in exchange. Lord St. Leonards, in fact (speaking of exchanges under Inclosure Acts), states, that "the title of the person holding the estate is the only one relating to it" (*l*): this may be admitted if the validity of the exchange be assumed: but, as such exchanges, and also exchanges of common-field land under the 4 & 5 Will. IV. c. 30, are only authorized to be made by or with the consent in writing of persons having certain specified interests in both estates (*m*), it is conceived that, in such cases, an abstract can scarcely be regarded as perfect, unless it disclose at least so much of the prior title to the estate taken in exchange as may be sufficient to show that the transaction was within the provisions

(*h*) *Bustard's case*, 4 Co. 121 a; Sug. 372.

(*i*) 1 Jarm. Conv. 75.

(*k*) 55 Geo. III. c. 147, see s. 3; and 56 Geo. III. c. 52, 1 Geo. IV. c. 6, and 6 Geo. IV. c. 8; 7 Geo. IV. c. 66; 1 & 2 V. cc. 23, 29, 106; 2 & 3 V. c. 49; 3 & 4 V. c. 113, s. 59; 5 & 6 V. c. 54, s. 5; 9 & 10 V. c. 73, s. 22; 23 & 24 V. c. 93, s. 41; 41 & 42 V. c. 42, s. 7. See, as to confirmation of void exchanges by the tithe-commutation commissioners, 5 & 6 V. c. 54, s. 7; and *R.* v. *Tithe Commrs.*, 19 L. J. Q. B. 177. Exchange of charity lands held valid, although the consenting Bishop was a trustee of the charity; *A.-G.* v. *Bishop of Worcester*, 9 Ha. 328.

(*l*) Sug. 373.

(*m*) See 4 & 5 Will. IV. c. 30, ss. 2, 4, and 25, in which note the words, "according to the provisions," &c.; and 6 & 7 Will. IV. c. 115, s. 35. See also 3 & 4 V. c. 31, s. 1, which, in cases falling within the Act, makes the award conclusive evidence that the provisions of the general Inclosure Act, and of the 6 & 7 Will. IV. c. 115, have been complied with, and that all necessary consents have been given; but, query, whether this meets the difficulty in the case of an exchange; it would rather seem to refer merely to such consents as are requisite to the validity of the inclosure. See *Duke of Beaufort* v. *Neeld*, 12 C. & F. 248; *Doe* v. *Gore*, 2 M. & W. 320.

of the Act. But where the estate has been taken in exchange under the general provisions of the Commons Inclosure Act, 8 & 9 Vict. c. 118 (*n*), the single title alone seems necessary; as the Act contains a clause making the award, when confirmed, conclusive evidence that the directions of the Act have been complied with, and declaring that every allotment, *exchange*, &c., specified and set forth in the award, shall be binding and conclusive on all persons whomsoever (*o*): and the same may probably be the case as respects private exchanges under sect. 147 of the Act (*p*). So, also, if the title be described in the particulars or conditions as arising under an exchange by virtue of an award under an Inclosure Act, it is sufficient if the abstract show a title by award in respect of other lands and common rights, without showing the particulars of the exchange: and if the agreement be that the title shall commence with the award, the purchaser cannot require the title of the lands given in exchange for those contracted to be sold (*q*).

Of land taken in exchange from a charity.

Formerly where the title depended upon an exchange under the 1 & 2 Geo. IV. c. 92 (authorizing the exchange of charity lands), it was necessary that the abstract should show the title as well to the lands given as to the lands taken in exchange: inasmuch as the right of re-entry in case of eviction was expressly reserved to the charity trustees (*r*); and it is conceived that the purchaser might require evidence of the land given in exchange having been quietly enjoyed by the charity.

(*n*) Amended by 9 & 10 V. c. 70, s. 11; and extended by 10 & 11 V. c. 111, ss. 4 and 6; and 12 & 13 V. c. 83, ss. 7 and 11; and see 15 & 16 V. c. 79, ss. 17, 31, 32; 17 & 18 V. c. 97; 20 & 21 V. c. 31; 22 & 23 V. c. 43; 31 & 32 V. c. 89; and 39 & 40 V. c. 56.

(*o*) Sect. 105; as to evidence of the award, see sect. 146; and see as to partitions by the commissioners, 11 & 12 V. c. 99, ss. 13, 14, and 15 & 16 V. c. 79, ss. 17, 31, 32.

(*p*) The commissioners appear to have power under this section to exchange gavelkind lands for lands held in common socage, and the tenure of the lands is not altered by such exchange; *Minet* v. *Leman*, 7 D. M. & G. 340. On exchanging freehold lands subject to heriots and reliefs there is no power in the commissioners to make the allotted lands so subject; *Mayor of Basingstoke* v. *Lord Bolton*, 3 Dr. 50; and see 12 & 13 V. c. 83, s. 11.

(*q*) *Cattell* v. *Corrall*, 4 Y. & C. 228.

(*r*) See sect. 9 of Act.

But the above Act is now repealed (*s*), and such exchanges take place under sects. 24 to 26 of the Charitable Trusts Act, 1853 (*t*), under which, no similar right being reserved, no such evidence can be required.

Under the recent Act.

Under a modern statute (*u*), where the trustees or persons acting in the administration of a charity have power to determine on any sale, exchange, partition, lease, or other disposition of the charity estate, a majority present and voting at a meeting of their body duly constituted, are to have full power to execute and do all such assurances and things as may be requisite for carrying such sale, &c., into effect; and their assurances and acts are to have the same effect as if executed by all the trustees or administrators, and by the official trustee of charity lands. Where the title is derived under this Act, or the previous Charitable Trusts Acts incorporated with it, the abstract must show that all the statutory requirements have been complied with.

Of land exonerated from tithe by exchange under 6 & 7 Will. IV. c. 71, s. 30.

So, where land has been exonerated from tithe by an exchange under the 6 & 7 Will. IV. c. 71, s. 30 (*x*), the title to the land given in exchange for the tithe must be shown (*y*).

Of estate which has attendant terms.

The title to terms of years attendant upon the inheritance, and which are considered to have merged under the 8 & 9 Vict. c. 112, must still be traced so as to show in whom they were vested at the time when they became subject to the operation of the Act (*z*); viz., by abstracting, if practicable, the deed creating the terms, and the modern mesne assignments: these latter, however, may be abstracted very con-

(*s*) 36 & 37 V. c. 91.

(*t*) 16 & 17 V. c. 137.

(*u*) 32 & 33 V. c. 110, s. 12. This section seems retrospective. See the Acts 16 & 17 V. c. 137; 18 & 19 V. c. 124; 23 & 24 V. c. 136; 25 & 26 V. c. 112, which are, so far as consistent therewith and not repealed thereby, to be construed with this statute.

(*x*) And see 5 & 6 V. c. 54, ss. 6 and 7.

(*y*) See 2 & 3 V. c. 62, s. 20.

(*z*) *Lyle* v. *Earl of Yarborough*, John. 70, 74. As to what is a satisfied term, see *Shaw* v. *Johnson*, 1 Dr. & S. 412.

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cisely (*a*): and when such deeds are numerous and voluminous, it is not uncommon for counsel when settling conditions of sale or a contract on behalf of a vendor to stipulate that such deeds shall be abstracted merely by giving their dates and a short statement of their effect, unless the purchaser chooses to have a full abstract at his own expense. The Act, it may be remarked, does not appear to extend to copyholds, customary freeholds (*b*), or leaseholds (*c*): and it has been doubted, although apparently without sufficient ground, whether the first and second sections extend to any hereditaments other than *land* ordinarily so called (*d*). It must, however, be borne in mind that a term does not become satisfied within the Act, unless the beneficial interest in the whole charge secured by the term and the beneficial interest in the whole estate are united and merged in the same person (*e*).

Of enfranchised copyholds.

Upon a sale of land formerly of copyhold or customary tenure, but which has been enfranchised, the purchaser cannot now (*f*), under a contract for the purchase of the freehold, call for the title to make the enfranchisement. It is, however, conceived that he may object to the title on grounds ascertained *aliunde*. Where the enfranchisement has been effected under the general enfranchisement Acts, it has never been necessary to show the lord's title (*g*).

Of leaseholds—freehold title must formerly be produced;

Previously to the 37 & 38 Vict. c. 78, the rule was, that upon a sale of leaseholds the abstract must (except in the case of a Bishop's lease (*h*)) show the lessor's title, as well as the subsequent title to the term (*i*); even although the

(*a*) Sug. 370.

(*b*) See Dav. C. Prec. 30.

(*c*) See sect. 3.

(*d*) Dav. C. Prec. 25, 30.

(*e*) *Anderson* v. *Pignet*, 8 Ch. 180.

(*f*) Conv. Act, 1881, s. 3 (2).

(*g*) 4 & 5 V. c. 35, see s. 64; 15 & 16 V. c. 51, ss. 11, 22, 33, 34, and 47; and see the saving in sect. 48, *et quære*. And see sect. 10 of 21 & 22 V. c. 94, which is substituted for sect. 11 of 15 & 16 V. c. 51; *Myers* v. *Hodgson*, 1 C. P. D. 609; and see *Keir* v. *Pauson*, 25 B. 394, a case under the Copyhold Act, 1852; and *vide ante*, p. 189.

(*h*) *Fane* v. *Spencer*, 2 Mer. 430.

(*i*) *Souter* v. *Drake*, 5 B. & Ad. 992; *Hall* v. *Betty*, 4 Man. & G. 410; *Clive* v. *Beaumont*, 1 De G. &

lessors were a corporation, and the lease was one of long standing (*k*). The rule, as to the non-production of the Bishop's title (*l*), rested on the ground of the lease having been granted in a mode prescribed by an Act of Parliament, and upon the presumed notoriety arising from the use of the episcopal seal; and it would seem to apply to leases granted by a Dean and Chapter, and possibly to other cases: and the general rule did not apply when the purchaser entered into the contract with notice that the freehold title could not be produced (*m*); nor was it clear that the rule applied where, on the sale of a lease of great antiquity, the vendor showed the creation of the term, and deduced the leasehold title for the last sixty years (*n*). But under the V. & P. Act, 1874, on the completion of any contract made after 1874, for the grant or assignment of a term of years, whether original or derivative, the intended grantee or assign is not entitled to call for the freehold title (*o*). And the Conveyancing Act, 1881 (*p*), precludes a purchaser of a term of years derived out of a leasehold interest in land from calling for the title to the leasehold reversion. By the Conveyancing Act, 1882 (*q*), an "intended assign" of a lease made under a power is precluded from requiring an abstract or production of any preliminary contract for or relating to the lease. These enactments, except perhaps the last, do not apply to leaseholds for lives.

but not under the V. & P. Act, 1874.

Except in what cases.

It has been held at Law that there is no difference between an agreement to grant a lease and an agreement to assign one, as regards the liability to make a good title (*r*). A person who agrees to let land agrees to grant a *valid* lease, just

Whether the agreement be to grant or assign a lease.

S. 397, 406; *Gaston* v. *Frankum*, 2 De G. & S. 561, *Smith* v. *Capron*, 7 Ha. 185. And see *Stranks* v. *St. John*, L. R. 2 C. P. 376.

(*k*) *Purvis* v. *Rayer*, 9 Pr. 488; see p. 522; and see *Friend* v. *Buckley*, L. R. 5 Q. B. 213.

(*l*) *Fane* v. *Spencer*, 2 Mer. 430.

(*m*) Sug. 369.

(*n*) 1 Jarm. Conv. 69.

(*o*) 37 & 38 V. c. 78, s. 2.

(*p*) Sect. 3 (1).

(*q*) Sect. 4.

(*r*) *Stranks* v. *St. John*, L. R. 2 C. P. 376; and cases cited; and see *Macbryde* v. *Weekes*, 22 B. 533.

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as a person who agrees to sell land agrees to execute a valid conveyance of it (*s*).

Renewable leaseholds.

Upon a sale of renewable leaseholds, if (as generally happens) the subsisting lease be expressed to be granted in consideration of the surrender of the prior lease, the abstract must show that the surrenderor was the equitable as well as the legal owner of the surrendered lease (*t*).

Of leases for lives.

If the lease be held for lives, evidence must, of course, be given, that the lives are in existence; and this, although there be a covenant for perpetual renewal (*u*).

Sales under Settled Land Act.

On a sale under the powers of the Settled Land Act, the dealings with the property between the dates of the settlement and the exercise of the power are immaterial to the title, excepting such dealings as are specified in sect. 20 and sect. 50 (3).

Of shares in mines.

Upon a sale of shares in mines, the purchaser is not entitled to a regular abstract of title to the mines themselves, as if he were purchasing a share in the land in which they are worked: but he is entitled to such evidence of the constitution of the company, and of the nature of the title under which the mines are worked, as will show that the subject-matter of the purchase is what it professes to be, and that the proposed form of transfer will give him a valid title to the shares (*x*).

Of railway or other shares.

Upon the sale of railway or other shares, little evidence of title is needed (*y*). Until the seller has paid up all his calls,

(*s*) Per Willes, J., in *Stranks* v. *St. John*, L. R. 2 C. P. 376.

(*t*) *Coppin* v. *Fernyhough*, 2 Br. C. C. 291; *Hodgkinson* v. *Cooper*, 9 B. 304.

(*u*) *Anderson* v. *Higgins*, 1 J. & L. 718. As to the construction of covenants for renewal, see the very recent case of *Swinburne* v. *Milburn*, 9 Ap. Ca. 844.

(*x*) *Curling* v. *Flight*, 2 Ph. 613; see 6 Ha. 41.

(*y*) *Shaw* v. *Fisher*, 5 D. M. & G. 596; *Wynne* v. *Price*, 3 De G. & S. 310.

the company may refuse to register the transfer (z); but if they acknowledge the transferee as a shareholder, they cannot recover from him the arrears due from his vendor (a). It is the purchaser's duty to see that the transfer is registered (b); but in order fully to protect himself from all liability in respect of future calls, the vendor should see that the purchaser's name is substituted in the register (c); for if he fail to do so, his name will be put on the list of contributories in the event of a winding-up. In such a case, the vendor will be entitled to an indemnity from the purchaser, notwithstanding that the transfer may not have been registered (d).

Of property forming part of a floating security for debentures.

A company which has issued debentures in the form of a floating security, and reserving power to sell and lease until default is made in payment of the principal sum secured or some part thereof, must, on making a sale of part of its property, supply reasonable evidence that no default has been made (e).

Of pews; in chancel.

Upon the sale of a messuage with pews claimed as appurtenant thereto, the right to the pews must be proved, either by production of the faculty, or by evidence of prescription (f). With respect to seats in the chancel, if the Rector allows seats to be erected or placed there by the parish, they seem to be thenceforth in the same position as pews in the body of the

(z) See as to shares in companies under the Act of 1862, sect 15.

(a) *Watson* v. *Eales*, 23 B. 294.

(b) *Sayles* v. *Blane*, 14 Q. B. 205; *Walker* v. *Bartlett*, 18 C. B 845, 861; *Re Ward and Henry's case*, 2 Ch. 431, 438.

(c) *Shepherd's case*, 2 Ch. 16; *Head's case*, 3 Eq. 84; *White's case*, *ib.* 86; and see *Shepherd* v. *Gillespie*, 3 Ch. 764; *Cruse* v. *Paine*, 6 Eq. 641.

(d) *Wynne* v. *Price*, 3 De G. & S. 310; *Walker's case*, 2 Eq. 564; *Head's case*, 3 Eq. 84; *White's case*, *ib.* 86; *Bowring* v. *Shepherd*, L. R. 6 Q. B. 309; *Castellan* v. *Hobson*, 10 Eq. 47. See as to the usages of the Stock Exchange, and their bearing on the contract, *Grissell* v. *Bristowe*, L. R. 4 C. P. 36; *Coles* v. *Bristowe*, 4 Ch. 3; *Loring* v. *Davies*, 32 Ch. D. 625; and see *post*, p. 1106.

(e) *Re Horne and Hellard*, 29 Ch. D. 736.

(f) See, on the right to pews, Shelf. R. P. 115; and *Pepper* v. *Barnard*, 12 L. J. Q. B. 361; *Knapp* v. *St. Mary, Willesden*, 15 Jur. 473. Section 2 of the Prescription Act does not apply to pews in a parish church; as to what evidence is necessary to prove a prescriptive title to such a pew, see *Crisp* v. *Martin*, 2 P. D. 15.

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church, and to be subject to the like jurisdiction of the Ordinary: but the Ordinary cannot interfere with pews occupied by the Rector and his family and tenants, nor, indeed, with any he has licensed; and he cannot introduce pews or seats into the chancel without the Rector's consent (*g*).

ıst extend ·r what ·iod—sixty ars.

As to the commencement of the title,—Before the V. & P. Act, 1874 (*h*), the rule was that upon a sale of freeholds, or (it is conceived) of copyholds or renewable leaseholds, except where the first lease was of more recent date, the title must go back at least sixty years (*i*); but by the Act, the period of forty years is substituted for that of sixty years, subject however to the purchaser being entitled to call for a title going further back than forty years in any case where, before the passing of the Act, he might have required more than a sixty years' title (*k*).

)ne hundred ·ears on sale ɔf advowson.

The title to an advowson must be carried back at least one hundred years (*l*); and the abstract should be accompanied by a list of the presentations during the period over which it extends (*m*). The rule, it is conceived, is the same, whether the advowson be sold as in gross or appendant; for although a sixty, or now a forty, years' title might be sufficient, if it could be shown that the advowson was in fact appendant to the principal estate, yet the purchaser, it may be contended, has a right to see that no destruction of the appendancy, by severance of the advowson, is disclosed by the earlier title.

(*g*) Ayliffe's Parergon, 486, Degge's Parson's Counsellor, 213 (173), 7th ed. 1820, Watson's Clergyman's Law, 388, 4th ed 1747; Nelson's Rights of the Clergy, 494, Prideaux's Directions to Churchwardens, 4th ed. 1716, 74, 75, see Brownl & G. 45, *dictum* per Lord Coke; *Clifford* v *Wicks*, 1 B & Ald. 498, *Morgan* v. *Curtis*, 3 Man. & R. 389. A pew in a chancel differs from one in the body of the church, since it may belong to a person in respect of the ownership of a house; and even a tenant of the house may acquire a permissive right to it, so as to bring an action for perturbation; *Parker* v. *Leach*, L R. 1 P. C 312, 327. As to property in a chancel generally, see *Chapman* v. *Jones*, L R. 4 Ex 273; *Ambrhnot* v. *Duke of Norfolk*, 5 C P. D. 390.

(*h*) 37 & 38 V c. 78.

(*i*) *Cooper* v. *Emery*, 1 Ph. 388; *Hodgkinson* v. *Cooper*, 9 B. 304; *Finch* v. *Shaw*, 19 B. 500; see *Moulton* v. *Edmonds*, 1 D. F. & J. 246.

(*k*) 37 & 38 V. c. 78, s. 1.

(*l*) See 3 & 4 Will. IV. c. 27, s. 30.

(*m*) Sug. 367.

We may remark here, that the word "living" is sufficient to pass the advowson; though it may be restrained by the context to the next presentation (*n*).

Must show creation of reversionary interest on sale thereof.

Upon the sale of a reversionary interest, whatever may be its antiquity, the abstract must go back sufficiently far to show its creation; and it should also be shown that the estate has been enjoyed in possession conformably with the instrument which created the reversionary interest (*o*). This, however, only applies to the sale of reversionary interests commonly so called, and not to the sale of an estate subject to an attendant term; in such a case it is sufficient to show a good sixty years' (or now a forty years') title to the freehold, and to the possession of the term, abstracting also the deed creating the term; and even if this be lost, the loss is said to be immaterial (*p*).

Showing sixty years' title to old term—whether sufficient.

It was stated in former editions that upon the sale of an old term of years, it is sufficient if the abstract show the creation of the term and a sixty years' title to the possession, omitting the intermediate title; and that the absence of the deed creating the term would not render the title unmarketable (*q*). However, in one case (*r*), where the passage in the text and the authorities on which it is based were cited, the Court of Exchequer Chamber held, that a vendor of leaseholds, who deduced a good title for more than sixty years, was bound to produce a lease dated in 1606, under which the property was held, there being nothing in the contract to prevent the purchaser from requiring its production.

On sale of old term in gross.

And it is conceived that in the case of the sale of an old term originally created by way of mortgage, or upon trust for raising portions, or for any other limited purpose, the abstract should set out, not only the instrument creating the term, but also those which evidence its subsistence as an

(*n*) *Webb* v. *Byng*, 2 K. & J. 669, aff. 10 H. L. C. 171.

(*o*) 1 Jarm. Conv. 61.

(*p*) 1 Prest. Abst. 249.

(*q*) 1 Jarm. Conv. 69; 1 Prest. Abst. 11, 249; and see Sug. 370.

(*r*) *Frend* v. *Buckley*, L. R. 5 Q. B. 213

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absolute estate: *e.g.*, a decree of foreclosure, or an assignment under a power of sale in the case of the mortgage term, or an assignment on the sale of a term for raising portions. A new danger arises in the case of the purchase of such a term by the operation of sect. 20 of the Settled Land Act, which enables the tenant for life, subject to a term, to convey free from the term, unless it has been conveyed, or created for securing money actually raised at the date of the conveyance by the tenant for life. Numerous instances occur in practice in which estates really held merely for the residues of old terms of this description have for many years been dealt with and treated as freehold; and their existence constitutes a source of danger to titles which it may often be impossible to guard against by any amount of professional vigilance.

On sale of tithes or other property derived from the Crown must show original grant.

Upon the sale of tithes held as a lay property, or of any other property held (as such tithes generally (*s*) are) under a grant from the Crown, the abstract should set forth the original grant, and then, omitting intermediate instruments, take up the history so as to show a good sixty (or now forty) years' title (*t*): so, where the tithes are considered to have been merged by the tithe-owner under the late Acts (*u*), and the estate is sold as tithe-free, the early title to the tithes must be similarly deduced (*x*); except in cases where the merger purports to have been effected by an instrument made with the consent of the Commissioners since the passing of the 9 & 10 Vict. c. 73 (*y*).

Rules not altered by the estate being merely equitable.

If the purchaser have agreed not to call for the legal estate, this will not shorten the period over which a title must

(*s*) Tithes may be held as lay property (*inter alia*) by virtue of sales for redemption of land tax.

(*t*) *Pickering* v. *Lord Sherborne*, 1 Crawf. & Dix, 254; 1 Jarm. Conv. 68, Sug 367. It is conceived that sect. 1 of the 37 & 38 V. c. 78, which in terms applies only to a contract for sale of *land*, cannot apply to a contract for the sale of incorporeal hereditaments like tithes, but see 13 & 14 V. c. 21, s 4.

(*u*) 6 & 7 Will. IV. c 71, s. 71; 1 & 2 V c. 64; 2 & 3 V. c 62; 9 & 10 V. c. 73, ss. 18, 19. It seems that impropriate tithes cannot be merged. See 2 Phil. Ec. Law, 1506; Shelford on Tithes, 292, n., 3rd ed.

(*x*) *Ibid.*

(*y*) See *Walker* v. *Bentley*, 9 Ha. 629, 632.

be shown to the equitable estate; and it must also be shown that no adverse use can be made of the legal estate.

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(4.) *As to the preparation, contents, and delivery of the abstract.*

As to preparation, contents, and delivery of the abstract.

Must if possible commence with a document; old deeds not to be abstracted; but must be produced if in vendor's possession.

The abstract must always commence with a document, of at least the requisite age, if the vendor have one: but neither can a purchaser require, nor would the vendor's solicitor be justified in furnishing, an abstract of deeds prior in date to that which would constitute a good root of title (*z*). Where the root of the title, as abstracted, is insufficient *per se* (as, *e.g.*, in the case of a general devise without proof of the testator's seisin), the purchaser may require an inspection of the earlier title deeds in the vendor's possession; but a purchaser cannot require the production, or any abstract or copy, of any document of title, dated or made before the time prescribed by law, or stipulated for commencement of the title, even though such document creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; and he cannot require any information, or make any requisition, objection, or inquiry, with respect to any such document of title, or the prior title, notwithstanding that such document, or prior title, is recited, covenanted to be produced, or noticed; and he is bound to assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any document of title forming part of the prior title are correct, and give all the material contents of such recited document, and that every such recited document was duly executed and perfected (*a*).

Effect of Conv. Act on purchaser's right to abstract, &c.

It must be carefully borne in mind that the rule above stated does not in the slightest degree affect the principles upon which a purchaser is entitled to assume that the document specified, either expressly, or, it is conceived, by implication of law, as the commencement of the title, discloses a good root of title, and that, therefore, where this is not the

(*z*) 1 Jarm. Conv. 63; but see *Friend* v. *Buckley*, L. R. 5 Q. B. 213, and *vide infra*.

(*a*) Conv. Act, 1881, s. 3 (3).

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case, it is necessary to state this in the conditions or agreement (*b*).

Must commence with what description of document as a root of title.

As a general rule, the first abstracted documents should purport to deal with the entire legal and equitable estates in the property; or should at least afford *primâ facie* evidence that the title to such legal and equitable estates was, at the date of such documents, consistent with the title as subsequently deduced: they should not be dependent for their validity upon any previous instrument; and should contain nothing raising a fair doubt whether the parties claiming the interests there purported to be dealt with, were in fact entitled so to deal with them.

Not with will containing general devise.

Thus, a general devise in a will of real estate is an insufficient root of title, there being nothing to show that the property in question was intended to, or could, have passed by it: the conveyance to the testator should be abstracted; or, if there are no earlier deeds, evidence should be furnished of his seisin at the date of his will: and even a specific devise is not an eligible root of title (*c*).

Whether with mortgage for a term—or a lease.

So also, it is conceived, a mortgage for a term of years, or a lease, is an improper commencement of an abstract of title to the fee simple, where the vendor has earlier documents; unless, perhaps, in cases where, independently of the mere fact of the demise (which might be attributed to a power, or to a mere chattel interest in the grantor), the instrument contains matter which furnishes a fair presumption that he was the absolute owner in fee. A vendor, however, in possession of earlier documents, could not be advised (except under very special circumstances) to commence his abstract with a lease, as it would almost inevitably lead to expensive discussions with the purchaser. And where a lease is relied on, it is necessary, unless it expired before the time of living

(*b*) See *ante*, pp. 173, 174; and *e g. Re Marsh and Earl Granville*, 24 Ch. D. 11.

(*c*) See *Parr* v. *Lovegrove*, 4 Dr. 170; *Re Banister*, 12 Ch. D. 131.

memory, to show that the lessee had actual possession of the estate (*d*).

Voluntary conveyance.

So, also, a voluntary conveyance is not a proper root of title (*e*).

Nor with instrument dependent for its validity on previous instrument.

So, also, an instrument relied upon as an exercise of a power should be preceded by the instrument creating the power; and the admittance to copyholds should be preceded by the surrender; and a recovery deed or a disentailing assurance, if it disclose an entail, by the deed creating the entail (*f*).

Except in certain cases—loss of prior instrument.

"If, however, such deed is lost, and possession has gone along with the estates created by the recovery for a considerable length of time, and the presumption is in favour of the recovery having been duly suffered," the loss of the deed, and want of evidence of its contents, are no objection to the title (*g*); and the same principle would probably apply in the case of the absence of a deed creating a power (*h*); or in the case of the loss of an ancient lease, on a sale of long leaseholds (*i*).

Nor with document which throws a doubt on earlier title.

So, if the first abstracted document contain recitals or other matter throwing a reasonable doubt upon the title as respects the contents or construction of the earlier documents, the purchaser may require the vendor, not only to produce, but also to abstract, so much of the prior title as may be sufficient to remove such doubt; but, in the absence of such reasonable doubt, the mere fact of earlier documents being recited would not entitle the purchaser to an abstract of them, even where he may require their production if in the vendor's possession

(*d*) *Clarkson* v. *Woodhouse*, 5 T. R. 412; Burt. Comp pl. 428.

(*e*) *Re Marsh and Earl Granville*, 24 Ch D 11

(*f*) 1 Jarm Conv 67 It is conceived that the proposition in the text is in no way affected by sect 3 (3) of the Conv. Act, 1881, *ante*, p 337.

(*g*) *Coussmaker* v. *Sewell*, Sug. 366

(*h*) See *Nouaille* v *Greenwood*, T. & R. 26.

(*i*) But see *Trend* v *Buckley*, L R. 5 Q B. 213, *et quære*, *ante*, p. 335.

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or power (*k*): and it is sufficient to produce (without abstracting) an instrument which is required simply "to establish a fact or negative an inference" (*l*). In cases coming within sect. 2 (2) of the Vendor and Purchaser Act, 1874, or sect. 3 (3) of the Conveyancing Act, 1881, the burden lies on the purchaser to show that recitals to which the sections apply are inaccurate (*m*).

Need not in all cases commence with a document.

It is not *essential* that the origin of the title should be shown either by deed or will; in the absence of documents it may be sufficient to produce evidence of such long uninterrupted possession, enjoyment, and dealing with the property, as to afford a reasonable presumption that there is an absolute title in fee simple (*n*). But the proof of title by evidence of possession is not admissible in cases where documents forming part of the modern title are lost or destroyed: in such cases the vendor must prove their contents and execution (*o*); for which purpose, when the land is in a register county, a registered memorial is good secondary evidence (*p*).

Recitals in first document should be fully abstracted.

As a general rule, the recitals in any document which is abstracted as a root of title, should, so far as it may in any way affect the estate comprised in the contract, be set out fully; even though the purchaser may be precluded from founding any requisition or objection thereon.

Wherever commenced should thence be regularly continued.

The title, wherever taken up, should be thence continued either in chronological or some other regular order. Where separate parts of the estate are held under separate titles, such titles should, of course, be traced separately so long as they remain distinct: every subsequent document dealing with the legal estate (except expired leases, and with the exceptions already referred to (*q*),) should be abstracted (*r*);

(*k*) See *Prosser* v. *Watts*, 6 Mad. 59; 1 Jarm. Conv. 63 and 64; 1 Hayes, Conv. 566.

(*l*) Sug. 418.

(*m*) See *Bolton* v. *London School Board*, 7 Ch. D. 766; *Re Marsh and Earl Granville*, 24 Ch. D. 11.

(*n*) *Cottrell* v. *Watkins*, 1 B. 365.

(*o*) *Bryant* v. *Busk*, 4 Rus. 1; Sug. 438.

(*p*) *Cathrow* v. *Eade*, 4 De G. & S. 527.

(*q*) *Ante*, p. 335.

(*r*) See the comments on this statement in *Gray* v. *Fowler*, L. R. 8 Ex. 249, 265.

for instance, a mortgage and a reconveyance are not to be suppressed under the notion that the title has been thereby brought back to its original state (s); such may, or may not, have been the case; and is a point to be determined by the advisers of the purchaser, not of the vendor. All documents forming part of the title should be abstracted in chief; the introduction of them merely as recitals in other abstracted instruments (which is not uncommon, especially in the case of wills) is, it is apprehended, clearly improper: were it not so, a copy of the conveyance to the vendor might, in many cases, take the place of an abstract; besides which, the omission to abstract a document in chief may proceed from a desire to avoid noticing matters of a suspicious character occurring in such document, but which are not noticed in the recital. It is convenient to introduce, in their proper places, direct statements of deaths, marriages, and other matters of pedigree; and not, as is frequently done, to trust to the recitals in the abstracted documents: and in cases of complicated descents, &c., a regular pedigree should accompany the abstract.

Documents should be abstracted in chief.

Statements of matters of pedigree.

Documents affecting merely equitable interests give rise to considerations of greater difficulty. Lord St. Leonards states generally, that the solicitor "should abstract every document upon which the title depends, or upon which any difficulty has arisen; wherever he begins the root of the title, he ought to abstract every subsequent deed" (t). This, however, it is conceived, must be understood to mean every document upon which the *purchaser's* title will necessarily depend. If, for instance, the vendor be possessed of a document declaring that a prior owner who purchased, apparently on his own account, was in fact a trustee, or, that a mortgage-debt was trust-money, the title of the *vendor* who has notice of the trust may depend upon various instruments which would be altogether immaterial to a purchaser destitute of such notice; and it would, it is conceived, be unusual, and improper, for

Suppression of instruments evidencing immaterial or satisfied equities—how far justifiable.

(s) As to the danger and impropriety of suppressing a mortgage, see *Heath* v. *Crealock*, 10 Ch 22.

(t) Sug. 407.

the solicitor to allow notice of such a trust to appear upon his abstract. This, however, it must be admitted, is, *pro tanto*, a departure from the general principle, that it is for the purchaser's solicitor, and not the vendor's, to judge of the materiality of the muniments of title; but it is sanctioned by convenience and universal practice (*u*). Other cases may perhaps occur in which a document may be, without material risk, suppressed; as, for instance, where a good title is shown to the legal estate, and a charge, which clearly operated merely in Equity, has been paid off and no trace of it appears upon the subsequent title. The difference between the suppression of such an instrument and a legal mortgage is evident: the equitable charge has no operation as against a subsequent purchaser for valuable consideration taking the legal estate without notice; and his title, therefore, is not dependent on the sufficiency of the release; nor does there seem to be any good reason for making a distinction between an equitable charge by deed, and a mere memorandum accompanying an old equitable mortgage by deposit, which, except upon special grounds, is never abstracted. But, in the case of a legal mortgage, the purchaser's title at Law will depend (theoretically if not practically) upon the legal validity of the deed of reconveyance, whether its existence be known to him or not. Still, even in the case of the equitable charge, it seems at least probable that a solicitor who suppresses it, under the idea that it is unimportant to the title, does so at a risk (*x*); and it is submitted, that such a course should rarely, or never, be taken, in respect of an instrument which is so framed that it could by possibility affect the legal estate (*y*); as, for instance, a mortgage of an equity of redemption, drawn as a conveyance with a proviso for redemption; and which, although merely a charge in Equity if the first mortgage be valid in Law, would yet pass the legal estate, supposing it not to have been effectually transferred by the prior instrument.

Deed which may operate on legal estate should never be suppressed.

(*u*) See *Re Hayman and Uxbridge R. Co.*, 24 Ch. D. 720.

(*x*) See Sug. 411.

(*y*) See *Palmer* v. *Locke*, 18 Ch. D. 381.

But in one case (*z*), it was held that a vendor was not justified in suppressing a letter creating an equitable charge, which was intended to be paid off; and, also, that he would not have been justified in so doing, even if the charge had been actually satisfied: and the Court, in commenting on the above passage in the text (as appearing in the 3rd edition), observed that it "must probably mean that where an equitable charge has been discharged, it may be advisable not to put it on the face of the abstract; but that he (the V.-C.) had no doubt that such charges ought in some way to be communicated to a purchaser." The intention of the writer, however, was not to limit the rule in the way suggested by the Court: but to lay it down generally, that where an informal equitable charge has been satisfied, its past existence may, except under special and exceptional circumstances, be altogether suppressed by the vendor's solicitor. The strict rule laid down by the Vice-Chancellor, Sir W. P. Wood, in *Drummond* v. *Tracey*, and sanctioned by Lord St. Leonards (*a*), may be theoretically correct: but its practical inconvenience, as much to purchasers as to vendors, is so great, that in practice it had previously been all but universally ignored: nor has the practice, it is believed, been materially, if at all, affected by that decision. Thus, to take a common instance, a solicitor, who is conducting a sale of his client's property, frequently makes him an advance in anticipation of the sale, and, as a security, takes an informal equitable charge upon the property, or the expected sale-proceeds, out of which, on completion of the purchase, the debt is satisfied. The existence of such an incumbrance is seldom, if ever, disclosed. Its suppression can in nowise prejudice the purchaser: its introduction upon the face of the title would be a probable source of future difficulty and expense. If the rule be really as laid down in *Drummond* v. *Tracey*, the conclusion seems to be inevitable that the astuteness with which modern conveyancers have striven to avoid the unnecessary disclosure upon a title of mere equities, has been altogether a mistake;—although

(*z*) *Drummond* v. *Tracey*, John. 608, 612.

(*a*) Sug. 411.

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their practice, in this respect, has been sanctioned by the example of the Court of Chancery itself, in its own conveyancing transactions;—and that every defunct equity, which, during the last sixty—or now forty—years, has affected the property, whether created by writing or merely by parol (for there is no valid distinction between the two modes of effecting the same result), ought to be abstracted: for of course it would be mere waste of time to communicate their past existence to the purchaser, and leave him to require the abstract to be amended. Upon the whole, with the greatest possible respect for the very eminent judge who decided *Drummond* v. *Tracey*, it is submitted that the rule, as stated by the writer, is one which is in conformity with long established conveyancing usage: and as such, and as being also based upon considerations of great practical convenience, it ought not lightly to be annulled or shaken. Of course, if the vendor or his solicitor is especially required to state whether there are any undisclosed incumbrances affecting the property, the existence of such an equitable charge, if subsisting, must be divulged. It is one of the inconveniences of such a requisition, that it may elicit information, which has been judiciously withheld.

As to liability of vendor's solicitor under 22 & 23 Vict. c. 35, for suppressing incumbrance, &c.

If the vendor's solicitor, by fraudulently suppressing a document, damnify the purchaser, he is answerable for the loss, and is made criminally responsible. By the 24th section of 22 & 23 Vict. c. 35, a seller or mortgagor, or his solicitor or agent, who conceals any instrument material to the title, or any incumbrance, from the purchaser or mortgagee, or who falsifies any pedigree, on which the title does or may depend, in order to induce such purchaser or mortgagee to accept the title, with intent to defraud, is made guilty of misdemeanor, and also liable to an action for damages. This section, it is conceived, can only apply to the fraudulent concealment of an *existing* incumbrance; nor will the vendor's solicitor be criminally responsible, if he suppress a mere equitable charge, which has been satisfied, or which no longer affects the title. The section plainly contemplates that there may be documents of title which are *not* material; what are,

and what are not, material in each particular case may safely be left to the discretion of the solicitor, who, with the penal consequences of this statute in view, is not likely to make an omission which will prejudice a purchaser.

As to loss of modern deeds.

The loss of a deed of a date subsequent to the commencement of the abstract, is no objection to the title, if, under all the circumstances, the clear presumption be that the instrument, if produced, would not throw any difficulty about the title (*b*); this doctrine, however, must be applied with the greatest hesitation to cases where modern deeds are lost, and no satisfactory evidence exists of their contents (*c*).

All charges should be noticed.

The abstract should notice all drainage and land improvement loans (*d*) and other subsisting charges upon the property; and should also, if the tithe has been commuted, state the amount and particulars of the commutation rent-charge.

Should be accompanied by copies of wills and private Acts.

Copies of wills abstracted (if of an at all informal character), and of private Acts of Parliament upon which the title depends, should accompany the abstract.

Plans may be referred to: but copies should generally be furnished.

It has been held at Law to be sufficient for the purpose of identification that the abstract should refer to, without containing copies of, maps or plans indorsed upon the deeds (*e*); but this can scarcely be so in cases where, as now often happens, a deed contains no substantive description of the property, but conveys it either merely, or as respects its details, by reference to the plan. According to present practice, a plan is generally employed, if not to define, at any rate to elucidate the description of the parcels: a tracing of it, when not sent with the abstract, is usually furnished upon

(*b*) *Minchin* v. *Vance*, 2 S. Atk. Conv. 386, b. See, as to earlier documents, *Prosser* v. *Watts*, 6 Mad. 59, and as to the loss of the lease under which the property is held, *Frend* v. *Buckley*, L. R. 5 Q. B. 213, see (in ejectment) *Doe* v. *Brooks*, 3 A. & E. 513.

(*c*) *Vide infra*.

(*d*) *Ante*, p. 97; *post*, p. 523.

(*e*) See *Blackburn* v *Smith*, 2 Ex. 792, *sed quære*.

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the purchaser's request; and may, it is conceived, in most cases be insisted on (*f*).

And by statement of evidence.

A statement of the evidence which the vendor is able to produce in support of the title may conveniently accompany the abstract; this, however, is not often attended to. When matters of importance are to be proved by statutory declaration, it is desirable, with a view to expediting business, that copies of the proposed declarations should accompany the abstract.

As to consulting counsel thereon on behalf of vendor.

Cases not unfrequently occur of complicated titles, in which the solicitor who prepares the abstract will be justified in laying it before counsel on behalf of his own client; this remark applies particularly to heavy mortgage transactions, in which considerable expense to the mortgagor may frequently be saved by the delivery in the first instance of a perfect and well-verified abstract.

Table of contents.

It not unfrequently occurs that a heavy abstract is prefaced by a concise analytical table of contents. The practice is a most commendable one.

How to be copied.

An abstract may be written so illegibly, or upon paper of such an inconvenient size or substance, as to justify the purchaser's solicitor or counsel in declining to receive it (*g*).

Effect of non-delivery of abstract, on purchaser's liability under the contract.

The non-delivery of a perfect or sufficient (*h*) abstract on the day named, discharges the purchaser from any conditions binding him to make objections, &c., within a specified time after delivery (*i*); and, at Law, formerly relieved him alto-

(*f*) As to the importance of a plan in ascertaining the parcels, see *Lyle* v. *Richards*, L. R. 1 H. L. 222; and *post*, p. 1092.

(*g*) See Sug. 406. Abstracts, it appears, ought in strictness to contain ten, but are usually passed on taxation if containing on an average eight, folios per sheet; *Re Walsh*, 12 B. 490; the fee for perusal has not been altered by the Sol. Rem. Act, 1881, see *Re Parker*, 29 Ch. D. 199; and cf. *Re Robertson*, 19 Q. B. D. 1.

(*h*) *Vide ante*, p. 321; as to what is a perfect or sufficient abstract.

(*i*) *Southby* v. *Hutt*, 2 M. & C. 211; and see *Roberts* v. *Berry*, 3 D. M. & G. 291; *Sherwin* v. *Shakspeare*, 5 D M. & G. 517; *Upperton* v. *Nicholson*, 6 Ch. 436; *Venn* v. *Cattell*, 27 L. T. 469.

gether from the contract (*k*): now, however, both at Law and in Equity (*l*), the purchaser will be bound if either he neglect to apply for the abstract within a reasonable time before the day fixed for its delivery (*m*); or if, upon its being subsequently tendered, he receive it without objection (*n*): but the wilful (*o*) neglect on the part of a vendor to prepare the abstract within proper time, when pressed by the purchaser to do so, will entitle the purchaser to avoid the contract so soon as the time fixed for completion has elapsed (*p*): where the purchaser's solicitor intends to rely upon the non-delivery of the abstract upon the day named, or (if no day have been named) within a reasonable time before the day fixed for completion, as a ground for refusing to complete the purchase, he should decline to receive it; or, if forwarded to him under circumstances which gave no opportunity for its rejection, he should at once return it, and without reading it (*q*).

Non-delivery, how to be taken advantage of.

Where it is important to the purchaser to complete (if at all) at or about the time fixed for completion, and the abstract, having been called for, is delivered so late as to render it doubtful whether this can be accomplished, the most expedient course would appear to be, to return it unread; offering, however, to receive it again, without prejudice to the purchaser's right to annul the contract, if, on investigating the title, it should be found impossible to complete at (or within some short specified period after) the time originally fixed for completion.

Suggested course of proceeding by purchaser.

Upon a sale of an estate with a title registered under the Land Registry Act, 25 & 26 Vict. c. 53, the abstract should consist of copies of such entries upon the register as are necessary in order to show the subsisting state of the title, as appearing, for the time being, upon the register, and irrespectively of

Abstract of title to estate with registered title.

(*k*) Sug. 260; *Berry* v. *Young*, 2 Esp. 640, n.

(*l*) Jud. Act, 1873, s. 25 (7).

(*m*) *Guest* v. *Homfray*, 5 V. 818, 823; *Jones* v. *Price*, 3 Anst. 924.

(*n*) Sug. 261; *Smith* v. *Burnam*, 2 Anst. 527.

(*o*) See *Roberts* v. *Berry*, 3 D. M. & G. 284; *Tilley* v. *Thomas*, 3 Ch. 61.

(*p*) Sug. 261; *Seton* v. *Slade*, 7 V. 265.

(*q*) See 7 V. 278.

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the antecedent history of the title. Sometimes, however, the entries relating to the subsisting title refer to the antecedent entries in such a manner as to incorporate them with the later entries; and in such a case, of course, such antecedent entries must themselves also be abstracted.

Section 5.

(5.) *As to the examination and perusal of the abstract.*

As to the examination and perusal of the abstract.

Whether to be compared with deeds before investigation of title.

The purchaser's solicitor may, if he please, compare the abstract with the deeds before investigating the title, and the vendor (assuming that there is a binding contract) must pay the costs if the title prove bad (*r*); but unless the abstract be apparently defective, it is better to defer doing so until counsel's opinion (if taken) is obtained upon it (*s*).

As to consulting counsel thereon on behalf of purchaser.

A purchaser's solicitor, it is conceived, is *primâ facie* legally justified in incurring the expense of counsel's opinion upon the abstract. In London, perhaps, the majority of titles (except those of the simplest description) are, or used to be, submitted to counsel: in the country, the practice inclines considerably the other way: it appears, however, that a solicitor ought himself to peruse an abstract before submitting it to counsel; and that he will be allowed a fee for such perusal, and also the stationer's charge for making a copy of the abstract (*t*). Titles, it is believed, are constantly accepted, almost without investigation, merely upon the faith of their having, on some previous occasion, been advised upon and accepted by counsel of eminence. It should, however, be remembered that the decisions of the various Courts of Law and Equity have a retrospective effect upon titles; so that, in estimating the value of a favourable opinion taken a few years previously, allowance must be made for the possibility of the title having been since rendered unmarketable, possibly unsafe, by some intermediate and unexpected exposition of the law (*u*). It is

As to the value of old opinions in favour of a title.

(*r*) *Hodges* v. *Earl of Lichfield*, 1 Bing. N. C. 499.

(*s*) Sug. 411.

(*t*) *Drax* v. *Scroupe*, 1 Dowl. 69.

(*u*) The decision in *Honeywood* v. *Forster*, 30 B. 1, and followed by that in *Gibbons* v. *Snape*, 1 D. J. & S. 621; and *Green* v. *Paterson*, 32

also important to know whether the counsel who accepted the title did so upon an open contract, or under the restrictive influence of special conditions; and whether any special reasons may have existed, which would probably render him astute in endeavouring to take a favourable view of the title. It may also be of some importance to know whether the investigation was on behalf of a purchaser or a mortgagee. For in some respects the requirements of counsel are, or ought to be, more, and in others they may properly be less, strict when advising on behalf of a mortgagee than when advising on behalf of a purchaser. For a mortgagee who looks merely to a return of his money, and cares nothing for the estate or any part of it except so far as it is a security for his money, on the one hand requires an absolutely safe title to a sufficient amount of property to leave him perfectly secure in all events; and if satisfied as to this, he may be comparatively indifferent to defects in title to that which he can afford to regard as a mere margin to his security. He might, therefore, on the one hand, in the case of a residential property, be indifferent as to a probable want of title to some particular part of it, the loss of which would be all-important to a purchaser, as destructive to the place as a residence, yet would leave an amount of unsightly but productive acreage amply sufficient to cover the amount of the mortgage debt. While, on the other hand, a mere shade of doubt respecting the soundness of the general title, which might very possibly be disregarded by a purchaser eager to acquire an attractive property, would be a sufficient reason for a mortgagee at once declining to advance his money. Land adjoining, or in the immediate vicinity of, residential property, and which if in other hands might be so used as to depreciate the principal estate, will often be purchased by the owner of such estate in disregard of great uncertainty respecting, or even of positive and serious objections to, the title. The above remarks apply particularly to questions as to evidence of identity of parcels, and as to

Ch. D. 95, establishing the necessity for entering a disentailing deed of copyholds upon the Court Rolls within six calendar months after execution, may be cited in illustration.

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boundaries, and easements. As respects mere pecuniary charges, it is obvious that when an estate is of very ample value, a question as to the possible existence of charges of limited amount, and which would be of serious importance to a purchaser, may be altogether disregarded by a mortgagee, who is about to advance his money upon that which, even *minus* the charge, is a perfectly satisfactory security.

Copy of agreement should accompany abstract.

The abstract, when submitted to counsel, should, of course, be accompanied by a copy of the agreement and conditions of sale (if any).

Acceptance of title shown by —to what it extends.

The acceptance of a title is no waiver of objections which are not disclosed by the abstract (*x*); nor is a client bound by his counsel's acceptance of a defective title, even although the defect appear upon the abstract (*y*); if, however, counsel waive a requisition, and the purchaser adopt his opinion and deal with the vendor on that view, he cannot afterwards repudiate it (*z*).

Defects in client's title must not be disclosed to client entitled to take advantage thereof.

If a solicitor be concerned for both parties, although of course bound to see that the purchaser does not buy with a defective title, or buy that which is in fact his own, he is not at liberty to disclose defects in the vendor's title of which the purchaser might himself take advantage; and a solicitor acting in contravention of the rule has been held liable in an action for damages (*a*).

Section 6.

As to the verification of the abstract.

Verification of abstract—

(6.) *As to the verification of the abstract.*

Assuming that an apparently good title is deduced by the abstract, the next matter for consideration is, the evidence

(*x*) *Const* v. *Barr*, 2 Mer. 57; *A.-G.* v *Sitwell*, 1 Y. & C. 570; *Ward* v. *Trathen*, 14 Si. 82; 8 Jur. 303; *McCulloch* v. *Gregory*, 1 K. & J. 286; and see *Boun* v. *Scenson*, 24 B. 631; *Turquand* v. *Rhodes*, 37 L. J. Ch. 830, where the purchaser had taken possession, and yet was allowed to rescind, on the ground of serious misdescription discovered *aliunde*.

(*y*) See *Deverell* v. *Lord Bolton*, 18 V. 505; *Stewart* v. *Allison*, 1 Mer. 33; *McCulloch* v. *Gregory*, 1 K. & J. 292.

(*z*) *Alexander* v. *Crosby*, 1 J. & L. 666.

(*a*) *Taylor* v. *Blachlow*, 3 Bing. N. C. 235.

which a purchaser may require in support of it; and this subject naturally divides itself into two heads; viz., first, what evidence may be required of the existence and genuineness of abstracted documents; and, secondly, what evidence may be required of other matters of fact.

What evidence may be required in proof of documents and facts.

A private Act of Parliament directed to be noticed as a public one, is sufficiently proved by the printed copy, if printed by the Queen's printer (*b*); and it is by an Act of the present reign rendered unnecessary to prove that the copy purporting to be, was in fact, so printed (*c*); nor was such proof previously necessary as respects Acts which contained the usual clause making printed copies evidence; in default of such evidence, an Act had to be proved by a copy examined with the original (*d*).

As to proof of private Acts.

An award under an Inclosure Act is proved by a copy, or extract, signed by the proper officer of the Court, if the enrolment have been made in one of the Courts at Westminster; or by the clerk of the peace for the county, or his deputy, if the enrolment have been made with the clerk of the peace (*e*).

Of awards under Inclosure Acts.

Copyhold assurances are proved by the copies of Court Roll signed by the steward; and it appears that, in strictness, evidence may be required of the steward's handwriting (*f*), except, perhaps, where he is dead (*g*), and the document is above thirty years old and comes from the proper custody (*h*): such a requisition, however, when even modern copies come from the proper custody, is not usual, in practice, unless there are special grounds for suspicion. Copies authenticated by

Of copyhold assurances.

(*b*) *Beaumont* v. *Mountain*, 10 Bing. 404.

(*c*) 8 & 9 V. c. 113, s. 3

(*d*) 1 Jarm. Conv. 169; as to proof of old private Act, which has been omitted from the Parliament Roll, see *Doe* v. *Bridges*, 7 Sc. N. R. 333.

(*e*) See 41 Geo. III. c. 109, s. 35; 3 & 4 Will. IV. c. 87, s 2.

(*f*) Scriven, 496.

(*g*) And death may, for this purpose, be presumed after 30 years; *Doe* v. *Michael*, 15 Jur. 677.

(*h*) Scriven, 497; *Wynne* v. *Tyrwhitt*, 4 B. & Ald. 376.

the steward are evidence, although they are not the copies originally delivered to the tenant (*i*); and so also are mere examined copies (*k*). The purchaser may, it is conceived, in the absence of special agreement, generally compel the vendor (at his own expense) to verify his abstract by the production of authenticated or examined copies (*kk*), in cases where the originals are lost, even although the steward will allow the purchaser to inspect the Court Rolls; probably, however, the rule might be different when, as may often happen, the vendor's solicitor, by being himself the steward, or otherwise, is enabled to produce the original Rolls at the proper place for verification of the abstract, and can satisfactorily account for the absence of the original copies, so as to avoid any difficulty which may be raised by the doctrine of *Whitbread* v. *Jordan* (*l*). If the vendor be thus obliged to procure fresh copies for the purpose of verification, they will (unless he sell to another person an estate of greater value held under the same title, or himself retain property held under the same title) belong to the purchaser (*m*). If a surrender have been by attorney, the power of attorney must be produced, and evidence must be given of the principal having been alive at the time of its being acted on (*n*); unless, indeed, it contain a declaration of irrevocability under the Conveyancing Act, 1882, and has been deposited under section 48 of the Act of 1881: and where the power was not given for valuable consideration (*o*), inquiry should be made, except in cases coming within the above-mentioned Acts, whether it was revoked prior to its apparent exercise: the statement of a power of attorney on the Court Rolls is secondary evidence of the original, if the latter cannot be found (*p*).

(*i*) *Breeze* v. *Hauker*, 14 Si. 350; and see now 14 & 15 V. c. 99, s. 14.

(*k*) See *Doe* v. *Freeman*, 12 M. & W. 844; and examined copies, not signed by the steward, do not require stamps: *S. C.*

(*kk*) This rule is of course subject to the provisions of the Conv. Act, s. 3, as to expense of production.

(*l*) 1 Y. & C. 303.

(*m*) Sug. 476.

(*n*) See cases cited 5 C. B. 917, n.; Sug. 417.

(*o*) Which would render it irrevocable, see *Abbott* v. *Stratten*, 3 J. & L. 603, 613; *Smart* v. *Sandars*, 5 C. B. 917.

(*p*) *Doe* d. *Counsell* v. *Caperton*, 9 C. & P. 112.

Deeds abstracted must be proved by the production of the originals, if not lost or destroyed (*q*); the attesting witness, or one of the attesting witnesses (if alive) may, perhaps, in strictness, be required at Law to prove the due execution (*r*), unless the deed be thirty years old and comes from the proper custody (*s*); but this, where a modern deed comes from such custody (*t*), is never urged in practice except upon special grounds (*u*); and such a requisition, unless made upon special and sufficient grounds, would probably be discountenanced by the Court. And now by the Common Law Procedure Act, 1854 (*x*), it is not necessary to prove by the attesting witness, any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto. When a deed has been executed by attorney, the same requisitions and inquiry should be made as in the case of a surrender by attorney (*y*). Where the loss or destruction of a deed can be proved (*z*), secondary evidence may be given of its contents; but proof must also be given of its due execution and delivery (*a*): an attested copy, however, taken and kept for 110 years in a public office, of a deed which could not be found, was admitted by Lord Hardwicke as sufficient evidence of the original; and he intimated that, under the special circumstances, a plain copy would have been admissible (*b*): so, in a modern Peerage case, the House of

(*q*) *Ante*, p. 159. As to mutilation of deeds, and defects in the stamps, &c., *post*, pp. 369, 370.

(*r*) *Laythoarp* v. *Bryant*, 1 Bing. N. C. 421.

(*s*) 1 Taylor, 598; *Man* v. *Ricketts*, 7 B. 93; *Doe* v. *Michael*, 17 Q. B. 276.

(*t*) *I. e.*, a place where it may reasonably be expected to be found, although not the *most proper* place of custody; *Croughton* v. *Blake*, 12 M. & W. 205; *Doe* v. *Phillips*, 8 Q. B. 158.

(*u*) 1 Jarm. Conv. 179. Lord St. Leonards seems to think that it is sufficient, in the absence of special circumstances, on the sale of freeholds, to prove the due execution of the conveyance of the fee to the vendor: Sug. 439; see *Thomson* v. *Miles*, 1 Esp. 184; *Nash* v. *Turner*, *ibid.* 217; but see also *Crosby* v. *Percy*, 1 Camp. 303.

(*x*) 17 & 18 V. c. 125, s. 26.

(*y*) *Ante*, p. 352.

(*z*) As to what evidence of loss is sufficient, *vide ante*, p. 159, n. (*t*).

(*a*) *Bryant* v. *Busk*, 4 Russ. 1; *Southby* v. *Hutt*, 2 M. & C. 207; see *Doe* v. *Brydges*, 7 Sc. N. R. 339.

(*b*) *Harvey* v. *Philips*, 2 Atk. 541.

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Lords admitted as evidence an attested copy of a settlement dated in 1693, produced from the proper custody, and according to which possession of the estates had gone for many years (*c*). Examined copies of the enrolment of deeds required by Law to be enrolled are, it appears, sufficient evidence of the originals; but, where the enrolment is not compulsory, a copy is evidence only as against the parties on whose acknowledgment enrolment was made, and their representatives (*d*): and the non-production of the original should be accounted for. The recital of a deed is evidence of its existence as against all parties executing the deed containing the recital, and those claiming under them, but is no evidence of its contents or effect beyond what its name and nature necessarily imply, unless proof be given of its loss or destruction (*e*); there are, however, exceptions to this rule in the case of ancient documents purporting to confer possession, from which the law has always permitted the inference to be drawn that such possession was had (*f*); and in cases falling within section 2 (2) of the Vendor and Purchaser Act, 1874, under which recitals, statements, and descriptions of facts, matters, and parties, contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, are sufficient evidence in the absence of proof to the contrary. An examined copy of the memorial of a deed registered in a register county is secondary evidence of the deed against the parties thereto, and all persons claiming under them (*g*); but probably not as against strangers (*h*).

Recitals of—when evidence.

The enrolment or an examined copy of the enrolment of

(*c*) *Fitzwalter Peerage*, 10 C. & F. 952.

(*d*) 1 Jarm. Conv. 170.

(*e*) Burt. Comp. pl. 478 *et seq.*; see *Gillett* v. *Abbott*, 7 A. & E. 783; *Bringloe* v. *Goodson*, 5 Bing. N. C. 738.

(*f*) *Bristow* v. *Cormican*, 3 Ap. Ca. 641, 688.

(*g*) *Wollaston* v. *Hakewill*, 3 Man & G. 297; *Doe* v. *Clifford*, 2 C. & K. 448; see *Hobhouse* v. *Hamilton*, 1 Sch. & L. 207.

(*h*) *Doe* v. *Clifford*, *supra*; *Allen* v. *Allen*, 1 Con. & L. 427, 457; but see *Collins* v. *Maule*, 8 C. & P. 502. As to memorials of assignments of Irish judgments, see *Fitzgerald* v. *Fitzgerald*, 8 C. B. 592.

any deed, executed under the provisions of the Acts relating to the Duchy of Cornwall, is sufficient proof of the contents and due execution of the original, although its non-production be not accounted for (*i*): so, too, the office copy of an enrolled bargain and sale is sufficient (*k*).

In a case in Ireland, by a settlement executed in 1745, estates were limited in strict settlement, with a power of revocation reserved to the settlor; this power was stated to have been exercised by a will dated in 1761, but of which neither the original nor any copy could be produced; the estates were re-settled in 1763 by a deed which recited the power of revocation and exercise of the power by the will, and possession had ever since gone under this deed; under these circumstances, Lord St. Leonards held the recital to be sufficient evidence of the contents and execution of the will (*l*).

The same estates were limited in strict settlement in 1788; in February, 1814, the tenant for life and first tenant in tail entered into articles of agreement to bar the entail and re-settle the estates to certain specified uses, with a power of revocation: neither the original nor any copy of the articles could be produced, although search had been made for them; they were, however, recited in the deed making the tenant to the præcipe, which was dated March, 1814: in 1815, upon the marriage of the tenant in tail, the power of revocation was exercised, and the estates were re-settled, and had since been enjoyed accordingly. Lord St. Leonards, after remarking that the articles appeared to have been voluntary, and that the settlement was for consideration, held, that, under the special circumstances of the case, the recital was sufficient evidence of the contents of the articles (*m*).

(*i*) 7 & 8 V. c. 65, s. 34.

(*k*) 10 Anne, c. 28 (Ruff. c. 18), s. 3.

(*l*) *Alexander* v. *Crosby*, 1 J. & L. 666; *Prosser* v. *Watts*, 6 Mad. 59.

(*m*) *Alexander* v. *Crosby*, *suprà*.

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Possibly, in the above case, the decision might have been different, if, instead of mere articles of agreement, the missing instrument had been one which affected the legal estate.

Lease for a year proved by recital.

Renewed ecclesiastical lease.

The recital or mention of a lease for a year in any conveyance executed before the 15th May, 1841, is sufficient evidence of the execution of such lease, without proof of its loss (*n*): and in any renewed ecclesiastical lease granted since the 21st June, 1836 (unless in pursuance of a covenant or agreement entered into before the 1st March, 1836), the recital of the old lease, and of the deaths, &c. of the *cestuis que vie*, is conclusive evidence thereof (*o*).

Acknowledged deed.

Where the title depends upon a deed acknowledged by a married woman, under the 3 & 4 Will. 4, c. 74, evidence should be given of the certificate of acknowledgment having been duly filed (*p*).

Fines.

A fine should be proved by the chirograph, or an exemplification under the seal (*q*) of the Court, or a copy examined with the original roll, and proved by the oath of the examiner (*r*): mere office extracts, although often relied on, and generally received by conveyancers, are not evidence (*s*).

Recoveries.

A recovery is proved by an exemplification or an examined copy (*t*).

Proof under statutes.

A sealed certificate by the proper officer of the enrolment of a disentailing assurance, or any other deed or document enrolled in Chancery, is sufficient *primâ facie* evidence that the same was duly enrolled at the time mentioned in the

(*n*) 4 & 5 V. c. 21, s. 2. See as to Ireland, 9 Geo. 2, c. 5; 1 Geo. 3, c. 3.

(*o*) 6 Will. IV. c. 20, ss. 2 and 9.

(*p*) *Jolly* v. *Handcock*, 7 Ex. 820. As to the mode and practice of taking acknowledgment, *vide post*, pp. 645 *et seq.*

(*q*) The loss of the seal is immaterial, if the document come from the proper custody; *Mayor of Beverley* v. *Craven*, 2 Mo. & R. 140.

(*r*) Burt. Comp. pl. 487; *Doe* v. *Ross*, 7 M. & W. 102.

(*s*) Buller's N. P. 227.

(*t*) Burt. Comp. pl. 490.

certificate; and copies of all enrolments, if stamped with the seal of the Chancery Enrolment Office, are evidence to the same extent and in the same manner as the original enrolments (*u*).

Certified copies.

So, certified copies of, or extracts from, deeds, documents, maps, &c., deposited in the Office of Land Revenue, Records, and Enrolments, are admissible in every case in which the original would have been admitted as evidence (*x*).

Public documents.

Statements made for public purposes in public documents are admissible as evidence. Public documents are such as are made, for the purpose of the public making use of them and being able to refer to them, by a public officer whose judicial or quasi-judicial office it is to make them (*y*). On this ground, entries of births and marriages, taken from the registers which are kept in India by order of the Indian Office, are admissible (*z*). So, too, an inquisition, directed by the Duke of Lancaster to three of his justices in 1360 A.D., a time when he had sovereign rights in the Duchy (*a*). So, too, a record, showing that a court of competent jurisdiction inquired into, and pronounced upon, a state of facts, or question of usage, at a time before living memory; for, though not properly evidence of reputation, such evidence is as strong as, if not stronger than, reputation: and the authorities are agreed that it is admissible, at least in cases where reputation would be admissible (*b*). So, too, the Heralds' Books, so long as the heralds made authoritative visitations (*c*).

Reputation.

Evidence of reputation to be admissible must be that of persons having, or presumed to have, competent knowledge.

(*u*) 12 & 13 V. c. 109, ss. 18, 19.

(*x*) 15 & 16 V. c. 62, s. 8.

(*y*) *Sturla* v. *Freccia*, 5 Ap. Ca. 623, 643.

(*z*) *Queen's Proctor* v. *Fry*, 4 P. D. 230.

(*a*) *Mayor of Manchester* v. *Lyons*, 22 Ch. D. 287, 299.

(*b*) *Neill* v. *Duke of Devonshire*, 8 Ap. Ca. 135, 186.

(*c*) *Sturla* v. *Freccia*, 5 Ap. Ca. 623, 644; and see *post*, p. 394.

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Thus, the depositions of deceased tenants of, or even mere residents on, a manor are admissible as to the customs or bounds (*d*). So, also, declarations of a deceased lord as to the extent of the wastes, but not as to the extent of his rights (*e*). So, also, depositions purporting to be made by copyholders in an ancient suit, are admissible without further proof of the witnesses having been copyholders, the special ground being that only as copyholders could such witnesses have given evidence (*f*). And reputation is generally admissible in evidence, though unsupported by proof of usage (*g*).

Recovery.

Where an estate has been purchased and held for twenty years or upwards under a title which depends upon a recovery which has not been enrolled, the deed duly making the tenant to the præcipe, and leading the uses of the recovery, is sufficient evidence thereof, as in favour of the purchaser, and all parties claiming under him (*h*).

Under Fines and Recoveries Act.

The 3 & 4 Will. IV. c. 74, s. 13, provides for the change of custody of the Records of Fines and Recoveries levied and suffered at Westminster, Lancaster, and Durham; and makes extracts and copies, supplied after such change of custody, as available in evidence as they would have been if supplied in the usual way before the passing of the Act; and by the 5 Vict. c. 32, provision is made for the enrolment, in the office of the Registrar of the Court of Common Pleas at Westminster, of the proceedings in Fines and Recoveries levied and suffered in the Courts of Great Session in Wales, and the Court of Great Session in Cheshire, and for remedying in certain cases defects in the original records (*i*), and for supplying evidence of the fines having been levied with

(*d*) *Lord Dunraven* v. *Llewellyn*, 15 Q. B. 791, per Parke, B., at p. 809.

(*e*) *Crease* v. *Barrett*, 1 C. M. & R. 919.

(*f*) *Freeman* v. *Phillipps*, 4 M. & S. 486.

(*g*) *Crease* v. *Barrett*, *ubi suprà*. As to evidence of customs of manors generally, see *A.-G.* v. *Tomline*, 5 Ch. D. 750; *Lascelles* v. *Lord Onslow*, 2 Q. B. D. 433.

(*h*) 14 Geo. II. c. 20, s. 4; repealed, Stat. Law Rev. Act, 1867.

(*i*) See *Doe* v. *Price*, 16 M. & W. 603.

proclamations; and as regards proclamations, the 11 & 12 Vict. c. 70, contains a similar provision as to fines at Westminster.

Proof of grant from Crown.

A grant from the Crown is regularly proved by an exemplification, or certified copy; but if the original be lost, and the vendor's solicitor ascertain and inform the purchaser where the grant is enrolled, the latter cannot, it appears, require a copy, but must examine the enrolment at his own expense (*k*).

Of proceedings at Law and in Equity.

Proceedings in the Courts of Law and Equity are regularly proved by exemplifications under the seals of the Courts, or authenticated by the signature of the Judge (in cases where the Court has no seal) (*l*); and proof of the seal or signature is rendered unnecessary by the 8 & 9 Vict. c. 113 (*m*).

And in Bankruptcy and Insolvency.

Proceedings in Bankruptcy and Insolvency are proved by copies certified in manner directed by the several Acts (*n*); proof of the seals and signatures is rendered unnecessary by the 8 & 9 Vict. c. 113, and also by the Bankruptcy Acts of 1849, 1861, 1869, and 1883 (*o*).

As to the enrolment of proceedings in Bankruptcy.

The fiat (or, if the case be under the Acts of 1849 or 1861 (*p*), the petition), adjudication, and certificate of appointment of assignees, if not enrolled, ought to have been

(*k*) Sug. 431.

(*l*) *Alles* v. *Bunbury*, 4 Camp. 28. As to foreign and colonial proceedings, see 14 & 15 Vict. c. 99, s. 7; as to Irish documents, see sect. 10.

(*m*) See last note.

(*n*) See, as to Insolvency, 53 Geo. III. c. 102, s. 24; 7 Geo. IV. c. 57, s. 76 (see *Doe* v. *Evans*, 1 C. & M. 450; *Doe* v. *Story*, 7 A. & E. 909); 1 & 2 V. c. 110, s. 105; 5 & 6 V. c. 116, s. 11; 7 & 8 V. c. 96, s. 37; 24 & 25 V. c. 134, s. 206: and as to Bankruptcy, 6 Geo. IV. c. 16, s. 97; 1 & 2 Will. IV. c. 56, s. 29; 12 & 13 V. c. 106, ss. 232 *et seq.*; 24 & 25 V. c. 134, ss. 203 *et seq.*; and see now 46 & 47 V. c. 52, s. 134, and under the former Act, 32 & 33 V. c. 71, ss. 107, 108.

(*o*) See 12 & 13 V. c. 106, s. 236, not repealed by the later Act; and see 24 & 25 V. c. 134, ss. 203, 204, 206, 207; 32 & 33 V. c. 71, s. 109; and see 46 & 47 V. c. 52, s. 137, and G. R. 1886, r. 58.

(*p*) 12 & 13 V. c. 106; 24 & 25 V. c. 134.

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entered on record by the vendor, and at his expense; Mr. Jarman considered that this was necessary, although the bankrupt was willing to join in the conveyance (*q*); Lord St. Leonards held the contrary; and also, that such a requisition could not be insisted on if it were too late to upset the bankruptcy (*r*): and this seems to be the sounder opinion.

Proceedings in Bankruptcy under the late Act.

A certificate by the Court as to the appointment of a trustee, and as to any change in the trusteeship, is by the recent Act made conclusive evidence that the person named in such certificate is trustee (*s*). And a minute, signed by the registrar, or other person presiding at a meeting of creditors under the Act, of the resolutions and proceedings at such meeting is to be received as evidence in all legal proceedings (*t*). And any petition, or copy of a petition, in Bankruptcy, or any order or copy of an order, or any certificate or copy of a certificate, made by any Court having jurisdiction in Bankruptcy, or any deed or copy of a deed of arrangement in Bankruptcy, or any other instrument or copy of an instrument, affidavit, or document made or used in the course of any Bankruptcy proceedings, or other proceedings had under the Act, shall, if it appears to be sealed with the seal of any Court having jurisdiction in Bankruptcy, or purports to be signed by any Judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever (*u*); and provision is made for the admission of sealed copies of the depositions of a deceased witness (*x*).

As to awards under the Copyhold Enfranchisement Act.

Copies of, and extracts from, every registered award under the Copyhold Enfranchisement Act, 1852 (*y*), purporting to be sealed or stamped with the seal of the commissioners, are evidence, without the necessity of further proof.

(*q*) 1 Jarm. Conv. 97.

(*r*) Sug. 542; see 12 & 13 V. c. 106, s. 236; 24 & 25 V. c. 134, s. 203; as to evidence by the London Gazette under the Act of 1883, see s. 132, and Yate-Lee, 552.

(*s*) 32 & 33 V. c. 71, s. 18, and sect. 54 (4) of 46 & 47 V. c. 52.

(*t*) Sect. 133.

(*u*) Sect. 134.

(*x*) Sect. 136.

(*y*) 15 & 16 V. c. 51, s. 49.

Orders in Lunacy.

So, office copies of orders in Lunacy, purporting to be signed by the Registrar in Lunacy, and sealed or stamped with the seal of his office, are evidence for all purposes of such orders (*z*).

Proof of by office copies.

Office copies (*i. e.*, copies made by an officer of a Court under its authority), although not strictly evidence (*a*), except in the causes or matters to which they belong, are received as evidence by conveyancers.

As to certified copies of records under 1 & 2 Vict. c. 94.

And we may here remark, that by the 1 & 2 Vict. c. 94, the Records of the Courts of Chancery, Exchequer, Queen's Bench, and Common Pleas, and of the abolished Courts in Wales, Chester, Durham, and Isle of Ely, are committed to the custody of the Master of the Rolls; and by sections 12 and 13, certified copies of such Records under the seal of the Record Office are made evidence equally with the originals.

As to notarial acts by Consular Agents.

British Diplomatic and Consular Agents abroad are empowered to do notarial acts; and any document, impressed or subscribed with the seal or signature of any such agent, in testimony of such notarial act having been done by or before him, is sufficient evidence, without proof of the seal or signature (*b*).

As to examined or certified copies under 14 & 15 Vict. c. 99.

And by the Act amending the law of evidence (*c*) it is enacted that "whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a

(*z*) 16 & 17 V. c. 70, s. 100.

(*a*) But see now 14 & 15 V. c. 99, s. 11.

(*b*) 18 & 19 V. c. 42; *Exp. Magee*, 15 Q. B. D. 332; and R. S. C. 1883, O. 38, r. 6, which reproduces 15 & 16 V. c. 86, s. 22; and see *Cooke* v. *Wilby*, 25 Ch. D. 769; *Cooper* v. *Moon*, W. N. 1881, p. 78, *Brittlebank* v. *Smith*, 32 W. R. 675.

(*c*) 14 & 15 V. c. 99, s. 14. This rule does not apply to the Bank of England, so as to compel it to depart from its practice in reference to proof of death; see *Prosser* v. *Bank of England*, 13 Eq. 611; and for a similar reason does not, strictly speaking, bind a purchaser.

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copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted;" and such copies or extracts are to be furnished on request at a charge not exceeding fourpence per folio of ninety words.

As to parochial registers.

Extracts from parochial registers, purporting to be signed and certified by the rector, incumbent, or even *curate*, have been admitted in evidence, without verification of his signature, or proof of his being the proper custodian of the registers (*d*); and an extract from a register of births, purporting to be signed by a Deputy Superintendent Registrar, as the person having custody of the register, is admissible in evidence on mere production (*e*).

Proof of will

The probate, or (if that be lost) an official copy, is usually received by conveyancers as sufficient evidence of a will, whether relating to real or personal estate (*f*); although the probate has been held to be in strictness inadmissible even as secondary evidence, in a question of title to freehold (*f*) or copyhold (*g*) property: however, in some modern Peerage cases, the copy of a will produced from the Prerogative Office was received in evidence, upon the absence of the original from the office being accounted for (*h*); and it has been held

(*d*) *Re Neddy Hall's Estate*, 17 Jur. 29, incorrectly reported in 2 D. M. & G. 748, see *Re Porter's Trust*, 2 Jur. N. S. 349.

(*e*) *Reg.* v. *Weaver*, L. R. 2 C. C. 85.

(*f*) 1 Jarm. Conv. 178, *Kerhin* v. *Kerhin*, 18 Jur. 813

(*g*) Scriven, 499, n. (*s*), *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 570, but see *Archer* v. *Slater*, 10 Sir. 624, 11 Sir 507. And see, as to the proof of a will, the original of which is abroad or has been lost, *Pullan* v *Rawlins*, 4 B. 142, and notes of cases subjoined, and *Rand* v. *Macmahon*, 12 Sir. 553.

(*h*) *Fitzwalter Peerage*, 10 C. & F. 952; *Braye Peerage*, 6 C. & F. 767; see, however, the *Netterville Peerage*, 2 Dow & C 342, where Lord Eldon held that proof must be given of the actual loss or destruction of the original.

that, under special circumstances, a purchaser of merely real estate might require a testamentary instrument to be proved in the Ecclesiastical Court (*i*). Now, under the recent Act to amend the Law relating to Probates and Letters of Administration in England (*k*), where a will affecting real estate is proved in solemn form, or where its validity is disputed, the heir and persons interested in the real estate are to be cited to appear (*l*); and where the will is proved in solemn form, or its validity otherwise decided on by the decree or order of the Court, the probate or a stamped copy of the will is made conclusive evidence of the contents and validity of the will, except in proceedings by way of appeal under the Act (*m*); and except in cases where the validity of the will is put in issue, the probate or an office copy is made evidence of the will and of its validity and contents; although it may not have been proved in solemn form, or declared valid in a contentious cause or matter (*n*).

Under recent Probate Act.

The Probate Act Book of the Ecclesiastical Court is evidence of the appointment of executors (*o*); and an official extract from such book has been usually received in practice, where (as in the case of tracing a title to a chattel real held in trust) there is little chance of the will containing a specific bequest of the term which may have been assented to by the executor (*p*); and such an extract is made evidence by the 14 & 15 Vict. c. 99, s. 14 (*q*): where, however, a title has to be shown to a beneficial chattel interest, the risk of there having been such a bequest and consent renders it necessary to examine the entire will; and it is conceived that the purchaser may, in either case, require production of the probate or an office copy. A will thirty years old, produced from the proper custody, proves itself; and it has been held that the thirty years are to be computed from the date of the will

Proof of appointment of executors.

(*i*) *Weddall* v. *Nixon*, 17 B. 160.
(*k*) 20 & 21 V. c. 77.
(*l*) Sect. 61, and see sect. 63.
(*m*) Sect. 62.
(*n*) Sect. 64.
(*o*) *Cox* v. *Allingham*, Jac. 514.
(*p*) The clause disposing of trust estates is generally so worded as to exclude chattels real, besides which the devisees in trust are usually the executors.
(*q*) *Dorrett* v. *Meux*, 15 C. B. 142.

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and not from the time of the death (*r*). Whether or not probate of a will in a colony is sufficient evidence depends on the constituted jurisdiction of the Court which granted such probate (*s*).

In deducing title to chattel interests probate must be seen to have been granted by proper Court.

In examining the title to a chattel interest, care should be taken to see that probate has been granted by a Court having jurisdiction. Where an executor took out prerogative probate, and died leaving an executor who proved in a Diocesan Court, the title of the second executor, as a representative of the original testator, was held too doubtful to be forced upon a purchaser (*t*). Under the present law this question cannot now arise, for the Court of Probate has the same powers as formerly belonged to the Prerogative Court of the Archbishop of Canterbury (*u*). It must be remembered that the validity of the testamentary disposition of an interest in immovable property is governed by the *lex loci*, and not by the law of the domicil (*v*).

Probate of leaseholds.

Will need not be proved in Equity.

Upon a sale by a devisee of a freehold estate, the purchaser could not under the old law (*x*), except under special circumstances (*y*), require the will to be proved in Equity against the heir-at-law; and it is conceived that the modern powers of the Probate Division of the High Court (*z*) have not affected the rule.

Documents not part of the title must

It may sometimes happen that a purchaser can require the production of an instrument, although it forms no part of

(*r*) *Man* v. *Ricketts*, 7 B. 93; see *Doe* v. *Michael*, 17 Q. B. 276.

(*s*) *Re Tootal's Trusts*, 23 Ch. D. 532; *Re Vallance*, 24 Ch. D. 177. For the purposes of the usual preliminary judgment in a partition action, letters testimonial of the Superior Court of Victoria have been held sufficient; *Waite* v. *Bingley*, 21 Ch. D. 674.

(*t*) *Williams* v. *Bland*, 2 Coll. 575.

(*u*) See 20 & 21 V. c. 77, s. 23.

(*v*) *Freke* v. *Lord Carbery*, 16 Eq. 461.

(*x*) See *Colton* v. *Wilson*, 3 P. W. 190; *Wakeman* v. *Duchess of Rutland*, 3 V. 234; *Machell* v. *Hunt*, 2 Mad. 34, 37; *Bellamy* v. *Lwersedge*, Sug. 439; *Smith* v. *Hibbard*, 2 Dick. 730; *post*, p. 1130.

(*y*) *Grove* v. *Bastard*, 2 Ph. 619; *McCulloch* v. *Gregory*, 3 K. & J. 12.

(*z*) See 20 & 21 V. c. 77, ss. 61, 63.

sometimes be produced as negative evidence.

the title, and although he cannot claim an attested copy on completion: *e.g.*, where property is vested in trustees, in trust to sell, with power to give receipts, and the trusts of the purchase-money are declared by a settlement referred to in the conveyance, it is generally considered that a purchaser can require the production of the settlement for the purpose of seeing that it contains nothing inconsistent with the power to give receipts, nor any other matter affecting the title, but that he is not entitled to any attested copy or covenant for production; and the fact of his not being entitled to such covenant or copy, negatives, it is conceived, the right of any subsequent purchaser to require the production of the settlement, unless it happen to be in the possession or power of the immediate vendor (*a*). It must, however, be noticed, that in a case of *Cooper* v. *Emery* (*b*), upon a sale by a party claiming under the heir-at-law of a deceased owner who left a will, Sir L. Shadwell, V.-C., is reported to have held that the purchaser was entitled to inspect the will, but could not insist upon a covenant for its production; thus, apparently, deciding that he was bound to accept a title without the ordinary means of proving its validity on a resale.

Deficiencies in proof of documents, how far supplied by presumption.

General rule.

In many cases, however, where the possession has been consistent with the *primâ facie* title, presumption may supply deficiencies in proof of the existence, or due execution of material instruments (*c*): the principle in the case of deeds (and which, in general, seems equally applicable to other instruments operating *inter vivos*), being this, *viz.*, that where there has been long enjoyment of any right which could have had no lawful origin except by deed, there, in favour of such enjoyment, all necessary deeds may be presumed, if there be nothing to negative such presumption (*d*). For instance, a

(*a*) *West* v. *Reid*, 2 Ha. 260.

(*b*) Cited, 1 Hayes, Conv. 573.

(*c*) See *Chalmer* v. *Bradley*, 1 J. & W. 63.

(*d*) *Lyon* v. *Reed*, 13 M. & W. 285, 303; approved in *Cleagh* v. *Blood*, 3 J. & L. 133; and see *Monck* v. *Hutchinson*, 1 Si. 285; *A.-G.* v. *Fishmongers' Co.*, 5 M. & C., at p. 25; and early cases collected in *Read* v. *Brookman*, 3 T. R. 151; and see *Delarue* v. *Church*, 20 L. J. Ch. 183; and *A.-G.* v. *Ewelme Hospital*, 17 B. 390.

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Presumption of grant from Crown.

grant from the Crown of an advowson (excepted in a former grant under general words) has been presumed as against a purchaser, after an uninterrupted possession evidenced by title deeds for 133 years and three presentations (*e*); so, a grant of foreshore has been presumed from a series of acts of ownership over it by an adjoining proprietor (*f*); so, a confirmatory or supplementary grant has been presumed, where the original grant would have been void for uncertainty (*g*); so, a reconveyance of the legal estate from trustees has been presumed, the property having for 110 years been dealt with without reference to its remaining outstanding, although the enjoyment was consistent with the supposition of such being the case (*h*): so, the fact of a lease having been duly executed has been held sufficiently proved by the production of the counterpart (*i*); so, where copyholds were devised to trustees, upon trust to pay testator's debts, funeral expenses, two annuities, and a legacy, and then to convey the premises to T. W.; and T. W. was admitted in 1771, and a party claiming under him accepted an enfranchisement in 1791, the validity of which was considered to

Of reconveyance of legal estate.

Of lease by production of counterpart.

Of copyhold surrender.

(*e*) *Gibson* v. *Clark*, 1 J. & W. 159; *A.-G.* v. *Eveline Hospital*, 17 B. 390; and see *Re Alston's Est.*, 5 W. R. 189.

(*f*) *Calmady* v. *Rowe*, 6 C. B. 861; *Mulholland* v. *Kilkn*, 9 Ir. R. Eq. 471. As to what sort of ownership must be established in order to admit of this presumption being drawn, see *Benest* v. *Pepon*, 1 Kn. 60. It is not necessary to prove acts of ownership on every part of the foreshore claimed, and the right to the whole may be presumed from acts of ownership in various parts of it; *A.-G.* v. *Mayor of Portsmouth*, 25 W. R. 559. The presumption does not so readily arise in the case of a Crown or public grant, as in the case of a grant from a private person. But as against a third party it is sufficient to show a possessory title without giving evidence sufficient to displace the title of the Crown; nor is it open to the defendant in trespass, at the suit of persons claiming under such a title, to prove any acts of ownership by the Crown, except such as are proved to have been done with the knowledge of the plaintiffs: *Corp. of Hastings* v. *Ivall*, 19 Eq. 558.

(*g*) *Des Barres* v. *Sley*, 22 W. R. 273.

(*h*) *Hillary* v. *Waller*, 12 V. 239; and see *Emery* v. *Grocock*, 6 Mad. 54; *Noel* v. *Bewley*, 3 Si. 103; *England* v. *Slade*, 4 T. R. 682.

(*i*) *Houghton* v. *Kong*, 18 C. B. 235. The counterpart has been allowed to be used for the purpose of correcting the lease, where there was clearly a clerical error in the latter; *Burchell* v. *Clark*, 2 C. P. D. 88; and see *Witham* v. *Vane*, 32 W. R. 617.

Of payment of mortgage, and of reconveyance.

depend upon the regularity of T. W.'s admittance, a prior surrender by the trustees to the use of T. W. was presumed as between vendor and purchaser (*k*): so, payment of a mortgage debt, and a reconveyance of the legal estate, have been presumed after an interval of eighty years, the mortgage not being subsequently mentioned in the title deeds, and the mortgage deeds having for twenty-five years been in the possession of the vendor and his ancestors, during which period no claim, it was alleged, had been made for principal or interest (*l*); but the lapse of forty-six years from the death of a testator, and of thirty-nine years from the last notice of legacies charged by his will, has been held insufficient to warrant a presumption of their payment (*m*): so, where property was demised in 1586 for 2000 years, with a covenant to convey the fee, if required by the lessees within seven years, it was presumed, from the dealings with it, that the property was freehold in 1715; and the presumption was not rebutted by its having been treated as leasehold in documents subsequent to that date (*n*). So, payment of purchase-money has been presumed after forty-years (*o*): so, where a memorandum of deposit, by way of equitable mortgage, by a former owner, is found with the title deeds, it will be presumed that the charge has been satisfied or released (*p*): so, after forty years' possession of copyholds under a will, a surrender to the use of the will was presumed in an early case (*q*): so, the enfranchisement of a copyhold has, after an enjoyment of 160 years, been presumed even against the Crown (*r*): so, in general, it will be presumed that

Of surrender to the use of will.

Of enfranchisement.

Of mesne assignment of terms.

(*k*) *Wilson* v. *Allen*, 1 J. & W. 614.

(*l*) *Cooke* v. *Soltau*, 2 S. & St. 154; and see *Sands to Thompson*, 22 Ch. D. 614.

(*m*) *Shields* v. *Rice*, 3 Jur. 950; *Prior* v. *Hornblow*, 2 Y. & C. 200; and see *Warren* v. *Bateman*, Fl. & K. 448, as to the insufficiency of the evidence of non-payment, out of the particular lands, of interest upon charges which also affect other lands; *et vide infrà*.

(*n*) *Jeffreys* v. *Machu*, 29 B. 344; but see *Pickett* v. *Packham*, 4 Ch. 190.

(*o*) *Biddulph* v. *Arundel*, 1 Ch. R. 50.

(*p*) *Nicoll* v. *Chambers*, 11 C. B. 996; but the point does not seem to have been discussed.

(*q*) *Lyford* v. *Coward*, 1 Vern. 195.

(*r*) *Roe* v. *Ireland*, 11 Ea. 280.

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mesne assignments of attendant terms have been regularly made (s).

Presumption of surrender.

"The current of the later authorities shows that where a term has been assigned to attend the inheritance, a surrender ought not to be presumed, unless there has been a dealing with the estate in a way in which reasonable men and men of business would not have dealt with it unless the term had been put an end to" (t); but such surrender is not to be presumed from a mere lapse of time (u); nor can it be presumed by a Court of Law, without the intervention of a jury (x). The Act of 8 & 9 Vict. c. 112, has deprived the doctrine of much of its practical importance; it must, however, be remembered that the Act is not of universal application (y); and that where it applies, a vendor must still show in whom old terms supposed to have been destroyed by the Act, were vested on the day when it came into operation; and that they were then attendant on the inheritance: so that the doctrine above referred to, of presuming the existence of mesne assignments, is still of practical moment.

Of grant of easement.

So, the grant of an easement will be presumed after twenty years' enjoyment (z); but, to raise such presumption, it is necessary to show, not only enjoyment, but that the party to whom the grant is attributed had power to make it (a); and a grant of an easement cannot be presumed where the user was not an injury to, or capable of being prevented by, the owner of the servient tenement (b).

(s) *Lord* v. *Baster*, 2 W. Bl. 1228; *White* v. *Polyanthe*, 11 V. 337, 350.

(t) *Per Curiam*. in *Gerrard* v. *Tuck*, 8 C. B. 249.

(u) *Doe* v. *Langdon*, 12 Q. B. 711, 719.

(x) *Cottrell* v. *Hughes*, 15 C. B. 532.

(y) *Ante*, pp. 329, 330.

(z) See *Darwin* v. *Upton*, cited 3 T. R. 159; and later cases cited in 1 Jarm. Conv. 151.

(a) *Barker* v. *Richardson*, 4 B. & Ald. 579; as to the statutory title which may be acquired under the Acts, and which is independent of the title which may be acquired under the ordinary doctrine of presumption (*Welcome* v. *Upton*, 5 M. & W. 398; *Daukhurst* v. *Wrigley*, C. P. Coop. 329), *vide* pp. 403 *et seq.*; and as to the Prescription Act having superseded the necessity of presuming a lost grant, see Lord Westbury's judgment, in *Tapling* v. *Jones*, 11 H. L. Ca. 290.

(b) *Sturges* v. *Bridgman*, 11 Ch. D. 852, 859.

Of land held in gavelkind.

Land in Kent is presumed to be of gavelkind tenure, unless shown to be disgavelled: but the presumption may be rebutted by showing from Domesday Book that it was then held in frankalmoign: or, in the case of a manor, (including its demesnes, but excluding the tenemental freeholds (*c*),) that it was held in ancient demesne; or that it was held by barony (*d*), or by great or little serjeanty (*e*), or by knight-service (*f*). The appendix to a valuable work (*g*) upon the Kentish tenures, gives a list of nearly 600 manors in the county, which were held by knight-service: and which, as also the lands formerly held of them, including the enfranchised copyholds, descend according to the common law; although most of them have been long considered to be of gavelkind tenure.

Of the formalities of deeds.

So, the formalities of a deed are readily presumed; for instance, sealing and delivery will be presumed from proof of signing, and the whole will (if the deed comes from proper custody) be presumed after thirty years without any proof at all (*h*); or within that time from proof of a deceased subscribing witness's handwriting (*i*): and this rule is not confined to deeds or wills, but extends to all written documents, provided that they purport to be thirty years old, and come from the proper custody (*k*). In a modern case, the House of Lords held that a parchment writing, purporting to be the first skin of an indenture consisting originally of two or more skins, and severed by a sharp instrument, but which came from the proper custody, was properly received in evidence in ejectment; and that the mutilation of a deed forms an objection rather to the value than to the admissibility of the evidence (*l*): so, livery of seisin will be presumed after

Notwithstanding mutilation.

Livery of seisin.

(*c*) Elton on the Tenures of Kent, p. 183.

(*d*) *Ib.* p. 197.

(*e*) *Ib.* p. 221.

(*f*) *Ib.* p. 280.

(*g*) *Ib.*

(*h*) As to loss of a seal, *ante*, p. 356, n. (*q*).

(*i*) 2 Taylor, 1571.

(*k*) 1 Taylor, 111. *Quære*, whether the rule applies to a deed under the seal of a corporation? See per Ld. Tenterden in *R.* v. *Bathwick*, 2 B. & Ad. 648.

(*l*) *Lord Trimlestown* v. *Kemmis*, 9 C. & F. 773, 775.

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Of appointment of Inclosure Commissioners.

Of deeds having been duly stamped.

twenty years' consistent possession (*m*): so it will be presumed that persons who have executed an award under the general Inclosure Act, were regularly appointed and took the necessary oaths (*n*): so, also, that an instrument, duly executed and which is lost, was also duly stamped (*o*); unless the particular circumstances of the case forbid such a conclusion; as where the instrument has been fraudulently destroyed by the party chargeable thereon, and it can be shown to have been unstamped when it came into his possession (*p*). And the burden of proving that a deed, which is either lost or cannot be produced, was not properly stamped rests with the person who raises such a contention, since the Court will presume, in the absence of evidence to the contrary, that it was duly stamped (*q*). But the presumption is destroyed by evidence that at any one time it was actually unstamped, in which case the party relying on the deed must prove that it was subsequently stamped (*r*): so, also, it will be presumed that stamps, the amount of which is obliterated, were of the right amount (*s*): but the Courts will not presume that forms have been complied with, which the Legislature, upon grounds of general policy, has made essential to the validity of an instrument; as, for instance, the enrolment under the Statute of Charitable Uses of the conveyance of an estate to trustees for a charity (*t*): nor will the Court presume the surrender of

But not of forms required by Law on grounds of general policy;

(*m*) *Rees* v. *Lloyd*, Wight. 123; and see *Doe* v. *Gardiner*, 12 C. B. 333; 1 Taylor, 151.

(*n*) *Casamajor* v. *Strode*, 5 Si. 87, 98; 2 M. & K. 708; and as to persons who have acted in an official capacity, there is a general presumption in favour of their due appointment; 1 Taylor, 187 *et seq.* With regard to joint stock companies, a stranger dealing with them has a right to assume that all requisites of internal management have been complied with, in the absence of notice actual or constructive; *Royal British Bank* v. *Turquand*, 5 E. & B. 248; 6 E. & B. 327; *Mahony* v. *East Holyford Co.*, L. R. 7 H. L. 869.

(*o*) *Hart* v. *Hart*, 1 Ha. 1; and see *Hughes* v. *Clark*, 15 Jur. 430, case of a counterpart lease; *Closmadeuc* v. *Carrel*, 18 C. B. 36; 1 Taylor, 168.

(*p*) *Smith* v. *Henley*, 1 Ph. 391; and see *Blair* v. *Ormond*, 1 De G. & S. 428.

(*q*) 1 Taylor, 168, and cases there cited.

(*r*) *Marine Investment Co.* v. *Haviside*, L. R. 7 H. L. 624.

(*s*) *Doe* v. *Coombs*, 6 Jur. 930.

(*t*) *Doe* v. *Waterton*, 3 B. & Ald. 149; *Wright* v. *Smythies*, 10 Ea. 409.

a prior life estate in order to set up a recovery, on the mere ground that, without it, there would have been no valid tenant to the præcipe (*u*): and there would seem to be, in general, a difficulty in presuming any fact or document which, had it ever occurred or existed, ought to remain on record.

nor, *semble*, of matters of record.

And it seems that, as a general rule between vendor and purchaser, the latter must admit, as presumptions, all matters which, in a Court of Law, the judge would clearly direct the jury to presume; but not matters as to which the judge would leave it to the jury to pronounce upon the effect of the evidence (*x*).

General rule of presumption between vendor and purchaser.

And now, as between vendor and purchaser, under a contract made since 1874, and subject to any stipulation to the contrary in the contract, recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations twenty years old at the date of the contract, are, unless and except so far as they shall be proved to be inaccurate, to be taken to be sufficient evidence of the truth of such facts, matters, and descriptions. It is conceived that this and the other rules laid down by section 2 of the recent Act, could not be held to apply to a case in which an option of purchase or right of pre-emption has been created on or before the 31st December, 1874, and is exercised so as to perfect the contract at a later date (*y*).

Rule as to recitals, &c. being evidence under the V. & P. Act, 1874.

By the Conveyancing Act, 1881 (*z*), a purchaser under a contract dated subsequently to the 31st December, 1881, is bound to assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of the title prior to the time

Under the Conveyancing Act, 1881.

(*u*) *Penny* v. *Allen*, 7 D. M. & G. 409.

(*x*) *Emery* v. *Grocock*, 6 Mad. 54; *Games* v. *Bonnor*, 33 W. R. 64; *Hillary* v. *Waller*, 12 V. see p. 270; see *Baldwin* v. *Peach*, 1 Y. & C. 453, which, however, was not a case between vendor and purchaser; and see *post*, pp. 1233, 1235, and cases cited, p. 1276.

(*y*) 37 & 38 V. c. 78, sect. 2, subsect. 2.

(*z*) Sect. 3 (3).

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prescribed by law or stipulated for commencement of the title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, inrolment, or otherwise.

Evidence of matters of fact.

As to what facts the purchaser can require to be proved.

As respects evidence upon matters of fact (other than documentary facts), it may, it is conceived, be laid down as a general rule, that a purchaser can, in strictness, require evidence of all facts material to the title from the date at which its regular deduction commences, whether such facts are to be used as positive or negative proofs; that is, of all facts whose existence must be either proved or assumed in order to establish affirmatively the vendor's title, *e. g.*, the heirship of a vendor who claims by descent; and of all facts the existence of which must be either proved or assumed in order to establish such title merely by displacing the known or presumptive title of others, *e. g.*, the failure, determination, or release of some prior estate or incumbrance the existence of which is either known, or may be presumed as between vendor and purchaser: so also, he may require a satisfactory explanation of matters which tend to impeach the validity or sufficiency of the abstracted instruments (*z*).

Negative evidence cannot be required if not in vendor's possession or power, but vendor must, if he can, answer all relevant questions.

But, as a general rule, a purchaser cannot compel the vendor to procure evidence for the purpose of negativing mere possibilities (*a*); although he may require him to answer to the best of his knowledge any relevant question on the subject, and to furnish all evidence in his possession or power (*b*); *e. g.*, where a power has been created, and there is no trace of its subsequent execution, the purchaser, although he can require the vendor and his solicitors to state whether to their knowledge or belief the power was ever exercised, and may, perhaps, require the vendor to make a

(*z*) See *Hobson* v. *Bell*, 3 Jur. 190; a case of erasures, as to which, however, see *post*, p. 480.

(*a*) *Re Ford and Hill*, 10 Ch. D. 365.

(*b*) *Ante*, p. 173.

statutory declaration upon the point, cannot, it is conceived, call for such a declaration by any other person; neither can he require the vendor to search for judgments or other incumbrances; so, neither, where the title commences with a conveyance by a person who conveys as heir-at-law, can the purchaser require any other evidence of the ancestor's intestacy than such (if any) as is in the vendor's possession (*c*): so, where a vendor is or has been married, the purchaser should inquire whether any settlement was executed on his marriage, and, if this were the case, may require to see the settlement if in the vendor's possession or power; but if the vendor cannot produce it or a copy, the purchaser, it is conceived, must rest content with his assurance or statutory declaration that it did not affect the property in question; although, as a matter of prudence, he should, of course, make inquiries of the wife's family on the subject (*cc*). In fact, the general rule would seem to be, that, where a *primâ facie* title is shown, the purchaser can require no evidence, not in the vendor's possession or power, tending to negative any matter, the existence of which may not be presumed, either from the contents or nature of the abstracted documents, or by the ordinary rules of Law or Equity.

But vendor showing a *primâ facie* title need not answer mere general fishing questions;

And it seems that, where a *primâ facie* title is shown, the purchaser cannot require from the vendor a general explanation of circumstances which the purchaser may consider to be of a doubtful character, but must confine himself to questions directed to the particular defect which he apprehends: where, for instance, a tenant for life with power of appointment exercised such power in favour of his eldest child, and the father and child then concured in mortgaging the property (a transaction which is *primâ facie* valid under the authority of *M'Queen* v. *Farquhar* (*d*),) upon a suit for specific performance, and an examination of the vendor upon interrogatories, an interrogatory as to the existence of an under-

(*c*) Sug. 439.

(*cc*) See *post*, p. 970.

(*d*) 11 V. 467; and see *Cochroft* v. *Sutcliffe*, 2 Jur. N. S. 323; and compare *Hannah* v. *Hodgson*, 30 B. 19.

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hand agreement that the child should join in the mortgage was not excepted to by his counsel, and appears to have been considered unobjectionable by the Court; but a general interrogatory as to "what was his motive or object in making the appointment" was held to be inadmissible (*e*).

and need not give explanations in respect of an adverse notice which has not been acted on;

And where an appointment had been made under similar circumstances in favour of an eldest child who joined with the parents in mortgaging the estate, and upon the mortgagee attempting a sale one of the younger children gave notice to the purchaser not to complete, stating that the appointment was a fraud upon the power, but not alleging any fact in support of this assertion, and did not follow up the notice by any proceeding, it was held, that a good title was shown, and that the notice did not oblige the vendor to render any further explanations (*f*).

Where, however, at a sale by auction by mortgagees under their power, a person entitled to redeem made a tender of the principal and interest, which was refused, and the sale proceeded, it was held that the purchaser, who saw the tender made and refused, was bound to make further inquiry (*g*).

but has under special circumstances been required to prove in Equity a will already established by a verdict at Law.

And where a will had been executed in favour of (*inter alios*) the medical man and solicitor of the testator, and the heir-at-law disputed the will and brought an ejectment, but a verdict was given for the defendants, it was, nevertheless, held by Lord Cottenham, that a purchaser could require the devisees to file a bill to establish the will against the heir (*h*).

Vendor need not disclose confidential

It appears that the purchaser cannot require the vendor to disclose confidential communications made by him to his

(*e*) *Pearse* v. *Pearse*, 1 De G. & S. 12, 16, and 17.

(*f*) *Green* v. *Pulsford*, 2 B. 70.

(*g*) *Jenkins* v. *Jones*, 2 Gif. 99.

(*h*) *Grove* v. *Bastard*, 2 Ph. 619; but the will being established, Lord Truro made him pay costs in the suit for specific performance; 1 D. M. & G. 69; and see *M'Culloch* v. *Gregory*, 2 K. & J. 12.

solicitors or counsel, or cases laid before counsel respecting the property, at least on points which may in any way whatever become the subject of litigation, although in no way apprehended, even where the same were made and prepared merely on behalf of the vendor, and not during a suit, or during a dispute, or after the threat of a suit (*i*).

communications.

Where the title is derived through an heir who took possession upon the ground of the assumed invalidity of his ancestor's will, which professed to deal with the estate, a purchaser may require the production of the will or evidence of its contents (*k*): so, on a sale by a devisee or party claiming under him, the purchaser may require the production of any subsequent will or codicil, or evidence of its contents (*l*). What the rule may be in cases where a will is known to have existed, but there is nothing to indicate that it purported to affect the property in question, seems to be more doubtful. The purchaser would, no doubt, be entitled to see either the original or the best evidence of its contents which the vendor had the means of supplying (*m*); but if none such could be procured, and, after making inquiries on the subject, no special grounds for supposing the estate to be affected by the will were found to exist, the purchaser, it is conceived, would be obliged to take the title (*n*).

Whether he must produce will as negative evidence of heir's *primâ facie* title.

Where codicils are referred to, but not abstracted, on the alleged ground that they do not affect the devises contained in the will, the purchaser should always require them to be produced, in order that he may satisfy himself that such is the case.

Codicils described as immaterial should be produced.

Where, in cases not coming within section 30 of the Conveyancing Act, 1881, the title is deduced through trustees or

Will of surviving trustee or

(*i*) *Pearse* v. *Pearse*, 1 De G. & S. 12; *post*, p. 994; and see further as to confidential communications *ante litem motam*, *Macfarlan* v. *Rolt*, 14 Eq. 580; and Bray on Discovery, 368 *et seq.*

(*k*) *Stevens* v. *Guppy*, 2 S. & S. 439.

(*l*) See and consider, *Howarth* v. *Smith*, 6 Si. 161.

(*m*) See *Cooper* v. *Emery*, 1 Hayes, Conv. 573.

(*n*) See the remarks of Wigram, V.-C., in *West* v. *Reid*, 2 Ha. 260.

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mortgagee should be produced.

mortgagees, the will of the last surviving trustee or mortgagee, though not containing any specific devise of trust or mortgage estates, should be abstracted, and probate or office copy produced, if it contains any general devise. It is frequently overlooked in the preparation of the abstract, that a mere general devise is sufficient to pass estates vested in the testator as trustee or mortgagee, unless from the form of the limitations, or from the purposes to which the testator has devoted the property, or from other circumstances, an intention can be inferred that trust and mortgage estates should not pass. What is sufficient evidence of such an intention can, in many cases, only be ascertained by an attentive perusal of the whole will. It appears to have been considered that the introduction into the devise of words of severance will not prevent such devise from operating upon trust and mortgage estates (*o*); but the case usually relied on as an authority seems scarcely to warrant such a conclusion (*p*), at any rate as respects trust estates.

How far vendor bound to furnish proof of intestacy.

And it is the universal practice, where a descent has occurred within a recent period, to require proof of the ancestor's intestacy as respects the property offered for sale, even although no trace of a will appears on the title: how far this can in strictness be insisted on (except as respects evidence which the vendor may have in his own possession or power) is perhaps doubtful: the length of time which may be considered sufficient to render such evidence unimportant must depend upon the state of the particular title: where an estate has been repeatedly sold or mortgaged, an interval of thirty or forty years is generally considered satisfactory.

Purchaser cannot require copies of

A purchaser is not entitled to copies of any instruments which are produced merely to negative a possibility, and

(*o*) See 1 Jarm. 661, 3rd ed.

(*p*) *Exp. Whiteacre*, cited 1 Sand. Uses, 421, n.; and see comments on this case, 1 Jarm. 697, 4th ed.

which he could not have compelled the vendor to produce, if they had not been in his possession.

documents produced as negative evidence.

Statutory declaration of vendor when insufficient.

The unsupported statutory declaration of the vendor as to a matter of fact material to the title, and peculiarly within his own knowledge, although very often accepted in practice, is not such evidence thereof as a purchaser is bound to accept (*q*); and it must be remembered that although statutory declarations by disinterested persons form in many cases the only evidence available to the conveyancer, and may be sufficient as between vendor and purchaser, such declarations except in cases where the general rule is relaxed by reason of the deaths of the declarants, and of the declarations being in respect to matters of pedigree, and made by members of the family, or being against the pecuniary or proprietary interests of the declarants, are not evidence in hostile litigation with third parties.

Want of proof of material facts may be supplied by presumption.

The want of evidence of matters of fact (other than documentary), as well as of the existence of documents conferring a title, may, however, be supplied by presumption; and the rule laid down in *Emery* v. *Grocock* (*r*), as to a purchaser being bound to presume whatever a judge at Law would clearly direct a jury to presume, applies (it is conceived) generally, although not universally (*s*), to questions of matters of fact between vendor and purchaser (*t*).

Evidence of modern usage as to what passed under ancient grants.

Thus, where, in construing an ancient deed, a question arises as to what passed by the terms of a particular grant, modern usage and enjoyment for a number of years is evidence to raise a presumption that the same course was adopted from an earlier period; and so to prove a similar usage and enjoyment at the date of the deed (*u*).

(*q*) *Hobson* v. *Bell*, 2 B. 17.

(*r*) *Ante*, p. 371; 6 Mad. 54.

(*s*) See Sug. 399; and *Games* v. *Bonnor*, 33 W. R. 664.

(*t*) See *Lapham* v. *Pike*, Rolls, 1831; cited in Atkinson on Marketable Titles, 397.

(*u*) See *Lord Waterpark* v. *Fennell*, 7 H. L. C. 650; where the question was as to what was included in the term "village" in a lease granted in 1704; and see also *Duke of Beaufort*

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Presumption of identity of parcels.

So, where, in 1801, an allotment under an Inclosure Act was made to A. in lieu of four acres of common field land, the Court, in 1847, assumed in the absence of evidence to the contrary, that the four acres formed part of five acres and a half of common land comprised in a deed dated in 1784 (*x*), but the vendor was held bound to make inquiries on the subject, and to produce the best evidence in his power of the five acres and a half having formed the only commonable land belonging to the allottee (*y*).

Of identity of individuals.

So, where a person, whose name and description correspond with those of a person previously named in the title, deals with the property in a manner consistent with the supposition of the two being identical, such identity must, in the absence of any reasonable grounds for suspicion, be assumed by a purchaser: this doctrine seems to be supported by a decision in the case of the *Braye Barony* (*z*), where it was held sufficient to identify A.—described in the ancient record, as of B.—with a person named A. in the pedigree, to show *aliunde* that the latter held land in B.

Of seisin.

Seisin may be presumed from facts which tend to show that the ancestor or testator acted as if he were the owner of the premises, *e.g.*, the production of leases which he has granted, and which have been followed by possession or payment of rent (*a*); or of a grant of an annuity by a

v. *Mayor of Swansea*, 3 Ex. 413; *Re Belfast Dock Act*, 1 I. R. Eq. 128; *Healy* v. *Thorne*, 4 I. R. C. L. 495; *Brew* v. *Haren*, 11 I. R. C. L. 198; and see *Rex* v. *Osbourne*, 4 Ea. 327; *A.-G.* v. *Forster*, 10 V. 338; *Bailiffs, &c. of Tewkesbury* v. *Bricknell*, 2 Taunt. 120; *Corp. of Hastings* v. *Ivall*, 19 Eq. 558, 581.

(*x*) *Major* v. *Ward*, 5 Ha. 604.

(*y*) *S. C.*, 12 Jur. 476. And see *Garnard* v. *Tuck*, 8 C. B. 248. As to the identity of lands of ecclesiastical and collegiate corporations, see 2 & 3 Will. 4, c. 80; of enfranchised copyholds, see 4 & 5 V. c. 35, s. 21; and 15 & 16 V. c. 51, s. 24; and of lands charged with tithe-commutation rent-charge, see 1 V. c. 69, s. 9. A tithe commutation map is not evidence of boundary in a case of disputed title; *Wilberforce* v. *Hearfield*, 5 Ch. D. 709.

(*z*) Cited Hub. on Ev. 465.

(*a*) See *Clarkson* v. *Woodhouse*, 5 T. R. 412, *n.*; 3 Doug. 189; *White* v. *Lisle*, 4 Mad. 214; *Welcome* v. *Upton*, 6 M. & W. 536.

person in possession, and which states that A. B. is the legal owner of the fee (*b*); or the production of receipts for rent given to persons who are proved *aliunde* (*e.g.*, by the production of land tax assessments, entries in parochial rate-books, &c.), to have been in the occupation of the premises; or by the declarations of such occupiers that they held of the party in question: but mere personal occupation, although sufficient to raise a presumption of title in ejectment (*c*), does not appear to have that effect as between vendor and purchaser (*d*).

As respects strips of waste.

Strips of waste lying beside an ancient highway or a river are, together with the soil to the middle of the way or river, presumed to belong to the owner of the adjoining inclosed lands (*e*). This presumption, however, seems to arise only as between such owner and the lord of the manor, and does not apply as between parties deriving title through different conveyances from a former owner of both the inclosed and waste land (*f*); and, even as against the lord of the manor, although it is not essential that the encroachment should be contiguous to, or have any direct communication with, the adjoining enclosed lands (*g*), yet the presumption may be rebutted by the circumstance of the strip communicating with a common or other large piece of waste (*h*), or by the fact that other strips, lying along the same highway but not necessarily adjoining the *locus in quo* (*i*), are held adversely to the landowner (*j*); nor does the presumption arise where the highway is modern, as,

(*b*) *Doe* v. *Coulthred*, 7 A. & E. 235.

(*c*) *Doe* v. *Penfold*, 8 C. & P. 536.

(*d*) Hub. on Ev. 131. See, on this subject, *Bulley* v. *Bulley*, 9 Ch. 739; and 1 Taylor, 601 *et seq.*

(*e*) 1 Jarm. Conv. 79, and cases there cited; and, in particular, Lord Tenterden's judgment in *Steel* v. *Prickett*, 2 Stark. 463; *Simpson* v. *Dendy*, 8 C. B. N. S. 433; affd. 7 Jur. N. S. 1058; and see *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. 133. The presumption does not arise in the case of land merely intended to be dedicated as a highway; *Leigh* v. *Jack*, 5 Ex. D. 264, 273.

(*f*) *White* v. *Hill*, 6 Q. B. 487.

(*g*) *Earl of Lisburn* v. *Davis*, L. R. 1 C. P. 259, and *vide ante*, p. 188.

(*h*) *Grose* v. *West*, 7 Taun. 39.

(*i*) *Dendy* v. *Simpson*, 18 C. B. 831; 2 Jur. N. S. 642, in the Ex. Ch.

(*j*) *Doe* v. *Hampson*, 4 C. B. 267.

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e.g., where made under the General Inclosure Act (*k*). Accretions to riparian property, caused by the gradual action of the stream, follow in title the adjoining land (*l*): conversely, land gradually encroached upon by water ceases to belong to the former owner (*m*).

Of continuance of seisin.

Seisin being once proved, or presumed, will be presumed to have continued until the contrary is shown (*n*).

Of intestacy.

Intestacy is a fact which, strictly speaking, does not admit of proof, but is merely matter of presumption: letters of administration are, in the absence of special circumstances, received by conveyancers as sufficient to raise the presumption; so is a will or probate of a will not affecting the estate in question, nor putting the heir to his election.

Of official appointments.

So, it will be presumed that persons who have acted in official capacities were duly appointed thereto (*o*), although the statements of such persons to that effect are not of themselves evidence of the fact.

Of person last entitled having been the purchaser, and stock of descent.

So, the statutory presumption that the person last entitled to land was the purchaser, and the stock of descent under the late Inheritance Act, will hold good as between vendor and purchaser (*p*). It has been observed, in a valuable work upon

(*k*) *Rex* v. *Hatfield*, 4 A. & E. 156. See as to what evidence will rebut the presumption, *Gray* v. *Rodman*, 1 Q. B. D. 160.

(*l*) Callis on Sewers, 51, and *Rex* v. *Yarborough*, 3 B. & C. 91.

(*m*) *Re Hull and Selby Ry. Co.*, 5 M. & W. 327. An exclusive right of fishery in a stream is not affected by its gradual deviation, nor does the owner of the land encroached upon acquire any right of fishery by such encroachment; *Foster* v. *Wright*, 4 C. P. D. 438. But such a right of fishery will not follow the waters of a river which has not deviated merely, but has permanently altered its channel; *Mayor of Carlisle* v. *Graham*, L. R. 4 Ex. 361; and see *Miller* v. *Little*, 4 L. R. Ir. 302.

(*n*) *Cockman* v. *Farrar*, T. Jones, 182.

(*o*) See, as to Inclosure Commissioners, *Casamajor* v. *Strode*, 5 Si. 87, 98; 2 M. & K. 708; as to Churchwardens, *Gourill* v. *Utting*, 9 Jur. 1081; as to Charity Trustees, *A.-G.* v. *Dalton*, 13 B. 141; 1 Taylor, 187 *et seq.*

(*p*) See 3 & 4 Will. IV. c. 106, s. 2; *Dorling* v. *Claydon*, 1 H. & M. 402.

evidence (*o*), that the presumption cannot safely be relied on by the conveyancer, because it might, after completion, be shown in litigating the title that such owner had not purchased but inherited the land, and that the vendor, though the heir of the immediate, was not the heir of the more remote ancestor: this, no doubt, is true; but in *every* case of *presumption* there is likewise a risk of the conclusion being shown to be unfounded. And it has been decided, that until some proof to the contrary is adduced, a vendor may rely on the statutory presumption, without any obligation to produce affirmative evidence in his possession; though he is bound to disclose matters within his own knowledge which tend to rebut the presumption (*p*).

Presumption in matters of pedigree—of legitimacy of child born in wedlock.

Thus also, (to come to matters of pedigree,) it is a general presumption of law, that a child born in wedlock, even a day after the marriage (*q*), is the child of the husband: and this, although the parties have separated by voluntary agreement (*r*), and the wife be living in adultery (*s*): but the presumption does not arise in the case of a child born after an interval, exceeding the usual period of gestation, since the date of a divorce *à mensâ et thoro* (*t*), or, it is imagined, since the commencement of the suit in the Ecclesiastical Court.

How rebutted.

The ordinary presumption is not to be rebutted by circumstances which create only doubt and suspicion; but it may be wholly removed by proper and sufficient evidence, showing that the husband was, 1st, incompetent; 2ndly, entirely absent at the period during which the child must in the course of nature have been begotten; or 3rdly, only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse (*u*): and it also

(*o*) Hubback, p. 121.

(*p*) *Dorling* v. *Claydon*, 1 H. & M. 402.

(*q*) See Co. Litt. 244 a.

(*r*) *Parish of St. George* v. *St. Margaret*, 1 Salk. 123; 1 Taylor, 129.

(*s*) *Bury* v. *Phillpot*, 2 M. & K. 349; *Morris* v. *Davies*, 5 C. & F. 163; *Hargrave* v. *Hargrave*, 9 B. 555; *The Queen* v. *The Inhabitants of Mansfield*, 1 Q. B. 444.

(*t*) *Parish of St. George* v. *St. Margaret*, 1 Salk. 123; *Hetherington* v. *Hetherington*, 12 P. D. 112.

(*u*) *Per* Lord Langdale, in *Hargrave* v. *Hargrave*, 9 B. p. 555. His Lordship puts another case, *viz.*, that of "the entire absence of the

seems that where the interview between the husband and wife has not been such as to raise an irresistible presumption of the fact of sexual intercourse, the subsequent conduct of the parties may be referred to for the purpose of establishing the fact of non-intercourse; *e.g.*, the circumstance that the wife who was living in adultery concealed the birth of the child, that the husband acted up to his death as if no such child were in existence, and that the adulterer aided in concealing the birth and subsequently reared and educated the child and left it all his property by his will (*x*). The old doctrine of *quatuor maria* has been long exploded (*y*).

Declaration of husband and wife inadmissible.

The evidence and declarations of the husband and wife are inadmissible for the purpose of establishing the fact of non-intercourse (*z*). It seems to have been considered that the rule is limited to this—that a married couple shall not be admitted to prove that they have had no connexion *after* marriage, and that the issue born in due time after marriage is spurious (*a*); but the principle seems to apply equally to a case where it is sought to establish the illegitimacy of a child conceived before, but born after, the marriage, by proving from the admissions of husband or wife their non-intercourse at the time of its conception; and in one case the

husband, so as to have no intercourse or communication of any kind with the mother:" but this seems to be an unnecessary extension of what is above stated as the second proposition; and see *Aylesford Peerage*, 11 Ap. Ca. 1.

(*x*) *Morris* v. *Davies*, 5 C. & F. 163; *Saye and Sele Barony*, 1 H. L. C. 507; and see *Bury* v. *Phillpot*, 2 M. & K. 349; *Clarke* v. *Maynard*, 6 Mad. 364; *Re Smelay*, 17 B. 523; *Legge* v. *Edmonds*, 25 L. J. Ch. 125; *Plowes* v. *Bossey*, 2 De G. & S. 145; *Bosvile* v. *A.-G.*, 12 P. D. 177.

(*y*) See *Pendrell* v. *Pendrell*, 2 Stra. 925; and see, on the general subject, *Banbury Peerage case*, 1 S. & S. 153; *Morris* v. *Davies*, 5 C. & F. 262; Hub. on Ev. p. 393 *et seq.*; *Saye and Sele Barony*, 1 H. L. C. 507; *Hawes* v. *Draeger*, 23 Ch. D. 173.

(*z*) See Hub. on Ev. 382, 383; and see 5 Cl. & F. 221; *Rex* v. *Sourton*, 5 A. & E. 180; *Atchley* v. *Spragg*, 33 L. J. Ch. 315; and see *Patchett* v. *Holgate*, 15 Jur. 308; also *Hargrave* v. *Hargrave*, 2 C. & K. 701. But the rule does not extend to render inadmissible letters or other documents in which such declarations are contained; *Aylesford Peerage*, 11 Ap. Ca. 1.

(*a*) *Anon.* v. *Anon.*, 22 B. 481, 482.

Court refused to allow the wife to be asked in cross-examination, whether her husband had, or had not, access to her before marriage (*b*).

32 & 33 Vict. c. 68.

The rule has, however, been relaxed in the case of parties to proceedings instituted in consequence of adultery, in which the husband or wife may now give evidence (*c*).

Presumption of marriage.

So, where evidence of marriage cannot be procured, the deficiency may be supplied by presumptions, arising either from cohabitation preceded by the usual preliminaries of marriage, or by the conduct and behaviour of the parties during cohabitation, and by the general reputation of the fact of marriage (*d*): for instance, in the cases of the *Roscommon Earldom* and *Stafford Barony* (*e*), the execution of marriage articles, and the grant of a Royal licence to the intended husband to marry his brother's widow, were respectively admitted as raising a presumption that the subsequent cohabitations had been preceded by marriage: so, in the case of the *Saye and Sele Barony* (*f*), the fact of the cohabiting parties having visited with families of respectability was successfully relied on as raising a presumption of marriage: so, in *Lord Ochiltree's case* (*g*), the baptism of a child as if legitimate was held to raise a like presumption: but where, as in Scotland, mere consent will constitute marriage, cohabitation, if in the beginning illicit, will continue to bear that character, unless it be clearly changed by the parties (*h*): so, in the *Shrewsbury Peerage case* (*i*), where it was necessary to prove a marriage between W. T. and M. D., and, in the absence of a certificate, the will of M. D.'s uncle was pro-

(*b*) *Anon.* v. *Anon.*, 23 B. 273.

(*c*) 32 & 33 Vict. c. 68, s. 3; and see *Re Rideout's Trusts*, 10 Eq. 41; *Re Yearwood's Trusts*, 5 Ch. D. 545. Proceedings by guardians of the poor to compel a husband to maintain a child of which he repudiates the paternity, are not within the section; *Nottingham Guardians* v. *Tomkinson*, 4 C. P. D. 343.

(*d*) *Re Nixon*, 2 Jur. N. S. 970.

(*e*) Cited in Hub. on Ev. p. 257; and see, in ejectment, *Doe* v. *Grazebrook*, 4 Q. B. 406.

(*f*) Cited in Hub. on Ev. p. 247.

(*g*) Hub. on Ev. 249.

(*h*) *Lapsley* v. *Grierson*, 1 H. L. C. 498, 506.

(*i*) 7 H. L. C. 1.

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duced in these words, "All this I give to my nephew W. T.," the production of the Act book from Doctors' Commons granting administration to "W. T., nephew, minor, and legatee," was held sufficient to raise a presumption of marriage between W. T. and M. D.

Decisions, on such points, in Peerage claims, are, it may be remarked, of higher authority between vendor and purchaser than similar decisions, even by the House of Lords, in adverse claims to property; inasmuch as, the claimant of a Peerage, like a vendor, is required to show not merely a better title relatively to some other, but to show that the title is absolutely and exclusively in himself (*k*).

Presumption as to validity of marriage, the *factum* being proved.

So, the mere *factum* of marriage being proved, the Law raises every possible presumption in favour of the existence of circumstances essential to its validity (*l*); but the Court will not presume a marriage according to the *lex loci* between persons living in the midst of an uncivilized community, unless first satisfied with the evidence as to the laws and customs of the natives in that respect (*m*).

As to the Legitimacy Declaration Act, 1858.

By the Legitimacy Declaration Act, 1858 (*n*), any natural born subject of the Queen, or any person whose right to be deemed a natural born subject, depends wholly or in part on his legitimacy, or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate in England, may petition the Probate Division of the High Court for a decree declaring that he is the legitimate child of his parents; or that the marriage of his father

(*k*) See Hub. on Ev. 63.

(*l*) *Piers* v. *Piers*, 2 H. L. C. 331; *Dumoncel* v. *Dumoncel*, 13 Ir. Eq. R. 97; *Harrison* v. *Corp. of Southampton*, 4 D. M. & G. 137; Taylor, 190; *De Thoren* v. *A.-G.*, 1 Ap. Ca. 686; *Sastry* v. *Sembecutty*, 6 Ap. Ca. 364; and see as to consent, *Re Birch*, 1 B. 358; *Reg.* v. *St. Mary Magdalen*, 2 E. & B. 809.

(*m*) *Armitage* v. *Armitage*, 3 Eq. 343; and see further on this subject, and as to marriages entitled to the privilege of necessity, *Ruding* v. *Smith*, 2 Hag. Consist. 371; Bright's H. & W. 118 *et seq.*

(*n*) 21 & 22 Vict. c. 93; extended to Ireland by 31 & 32 Vict. c. 20.

and mother or of his grandfather and grandmother was a valid marriage; or that his own marriage was or is valid; and power is given to the Court to determine the question of legitimacy, or of the validity of any such marriage: but its decree is not to prejudice the rights of persons who are not cited, or to have a valid effect if obtained by fraud or collusion.

Presumption of death:—as between vendor and purchaser:

As between vendor and purchaser, no presumption of death arises from the mere fact of a person having been unheard of for seven years (*o*); nor can any precise period be fixed which will raise such a presumption; but every case must depend upon its own particular circumstances. For instance, in a case like that of the *President* steam vessel, never heard of after setting out to cross an open ocean like the Atlantic, the Courts would probably at the end of seven years presume the death of all parties on board, even as between vendor and purchaser (*p*); while they might hesitate, even after a very much longer period, to come to the same conclusion, between vendor and purchaser, in the case of a vessel supposed to have been lost in navigating an ocean, thickly studded with islands, like some parts of the Pacific.

as between adverse claimants to property.

There have been many decisions upon the above point as between adverse claimants to property: for instance, the mere absence beyond seas of a mortgagor for thirty years without being heard of, was, in an old case, held sufficient to entitle the heir to redeem (*q*); so, as between parties claiming under a will, the death of the legatee has been presumed from absence in America without tidings or reply made to advertisements for twenty-two years (*r*); so, in

(*o*) Hub. on Ev. 178; as to evidence of sufficient inquiry, see *Doe* v. *Andrews*, 15 Q. B. 756. In Scotland the presumption of death after seven years has recently been created by Statute; 44 & 45 Vict. c. 17, s. 8.

(*p*) See *Sillick* v. *Booth*, 1 Y. & C. C. C. 117.

(*q*) *Masten* v. *Cookson*, 2 Eq. Ca. Ab. 414.

(*r*) *Rust* v. *Baker*, 8 Si. 443.

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Cuthbert v. *Purrier* (s), where a fund was set apart to answer an annuity to a native woman in India, of whom nothing had been heard since 1815, Lord Cottenham, in 1837, ordered payment of the principal to the party entitled subject to the annuity, without requiring any security to refund (t); so, in *Douley* v. *Winfield* (u), (an administration suit,) Shadwell, V.-C., presumed the death of a legatee who, when of the age of seventeen, had deserted his ship at one of the Sandwich Islands, and had not been heard of for twelve years: and in another case his honour ordered payment out of Court of a sum of money to the administrators of a person who had gone to America and had not been heard of for seven years (x): but the Court will require evidence of all practicable inquiry having been made (y): and has refused to act on the common presumption when circumstances rendered it improbable that the absentee, if alive, would have communicated with his friends (z).

Non-receipt of tidings as raising presumption of death.

The value of the non-receipt of intelligence of a person who has gone abroad, and has not been heard of for several years, and who cannot be presumed to have perished by some casualty, as the foundering of a vessel in which he is known to have been a passenger, must depend upon the special circumstances of each case; as, *e.g.*, the duration of his absence, and whether it can be satisfactorily explained or not, the nature of the last communication received, and whether the previous communications were frequent or intermittent, the station in life of the missing person, and the degree of relationship or intimacy subsisting between him and the persons with whom he was in the habit of corresponding. In many cases the mere non-receipt of

(s) 2 Ph. 199.

(t) 2 Ph. see p. 200.

(u) 14 Si. 277; and see *Watson* v. *England*, 14 Si. 28.

(x) *Dunsmure* v. *Boulderson*, 5 Jur. 958; and see *Whitlow* v. *Dilworth*, 2 S. & G. 35, in which, however, there were special circumstances; see also *Re Webb's Estate*, 5 I. R. Eq. 235.

(y) *Re Creed*, 1 Dr. 235; see *Re Lyford's Tr.*, 17 Jur. 570.

(z) *Bouden* v. *Henderson*, 2 S. & G. 360; see *In re Mileham*, 15 B. 507; and *Mullaly* v. *Walsh*, 6 I. R. C. L. 314.

tidings for a period of seven years is wholly insufficient to raise the presumption; and in all cases the evidence of those who are interested in proving the fact of death must be received with hesitation.

Proof of death of *cestui que vie.*

We may here remark, as connected with the present subject, that by the 18 & 19 Charles II. (Ruff. 19 Ch. II.) c. 6, s. 2, if a person for whose life an estate is granted goes abroad, and there is no sufficient evidence that he is alive, the judge, in any action commenced for the recovery of the lands by the lessors or reversioners (*a*), shall direct the jury to give their verdict as if the person remaining abroad were dead: and by the 6 Anne, c. 72 (Ruff. c. 18), s. 1, a reversioner or remainderman may, by proceedings in Chancery, procure the production of tenant for life or *cestui que vie* (*b*).

Production of *cestui que vie.*

Presumption as to time of death.

As respects the time of death, the presumption, in cases of adverse claims to property, used to be that the absentee died at the end of the first seven years after he was last heard of; unless there were special circumstances for raising a presumption, tantamount to proof, of death at an earlier period; as, *e.g.*, the fact of the party when last heard of being in a bad state of health, and having arranged to return to his friends in six months (*c*); or the state of weather succeeding the departure from port of a ship which is never afterwards heard of (*d*). In *Ommaney* v. *Stilwell* (*e*), a mate in the last Arctic Expedition under Sir John Franklin, which was never heard of since June, 1845, was after considerable hesitation, presumed to have survived his father, who died in January, 1850. There was evidence that about forty of the expedition, which originally consisted of 133, were seen by Esquimaux in the month of April or May 1850; and it was considered

(*a*) This has been held to include remaindermen.

(*b*) As to mode of procedure, see Dan. C. P. 2197 *et seq.*; and *Re Owen*, 10 Ch. D. 166; *Re Thomas Stevens*, 31 Ch. D. 320.

(*c*) *Webster* v. *Birchmore*, 13 V. 362; *Re Lyford's Tr.*, 17 Jur. 570.

(*d*) *Sillick* v. *Booth*, 1 Y. & C. C. C. 117.

(*e*) 23 B. 328.

probable that this mate, who was a strong active young man, was among the number. In *Re Corbishley's Trusts* (*f*), a trust was declared by deed in favour of a person who had not been heard of for five years, and it was held that he must be taken to have survived the settlor, and that his representatives, and not those of the settlor, were entitled to the fund. In *Dowley* v. *Winfield* (*g*), the Court, in the absence of any special circumstances, presumed that the legatee, a sailor, who had left his ship in the spring of 1832, died before the death of the testator, which occurred in September, 1833; and the legatee's share was paid over to other parties on their giving security to refund: so, in *Cuthbert* v. *Purrier* (*h*), the Court ordered the entire accumulations of the annuity, from the time when the annuitant was last heard of, to be paid over to the party entitled subject to the annuity, on his giving his bond to refund: but these decisions cannot be reconciled with the later authorities (*i*) which in effect lay down, first, that although a person who has not been heard of for seven years is presumed to be dead, yet, in the absence of special circumstances, there is no presumption from that fact as to the particular period at which he died; secondly, that a person, alive at a certain period of time, is to be presumed to be alive at the expiration of any reasonable period afterwards; and thirdly, that the onus of proving death at any particular period within the seven years lies with the party alleging death at such particular period. In one case (*k*), V.-C. Malins carried the doctrine still further, and laid it down that as the presumption of death does not arise until the expiration of the seven years, so within that period there

(*f*) 14 Ch. D. 846; and see *Hickman* v. *Upsall*, 4 Ch. D. 144.

(*g*) 14 Si. 277.

(*h*) 2 Ph. 199, *supra*; and see *Grissall* v. *Stelfox*, 9 Jur. 890; *Wilcock* v. *Purchase*, *ib.* note.

(*i*) *Doe* v. *Nepean*, 5 B. & Ad. 86; *Nepean* v. *Doe*, 2 M. & W. 894, 912; *Lamb* v. *Orton*, 6 Jur. N. S. 61; *Dunn* v. *Snowden*, 2 Dr. & S. 201; *Thomas* v. *Thomas*, *ib.* 298; *Re Phenés' Trusts*, 5 Ch. 139; *Re Lewes' Trusts*, 6 Ch. 356; *Pennefather* v. *Pennefather*, 6 I. R. Eq. 171; *Re Rhodes*, 28 L. T. 392; *Prudential Assurance Co.* v. *Edmonds*, 2 Ap. Ca. 487, 509. In the last case it was said by Lord Blackburn that inquiry and search should be made among those who, if he were alive, would be likely to hear of him.

(*k*) *Re Benhams' Trusts*, 4 Eq. 416, 419.

is a presumption of the continuance of life; but, on appeal, the order of the V.-C. was discharged on the ground that the time of death is not a matter of presumption, but of affirmative proof (*l*): and this is now the well settled rule (*m*).

Rules upon, as between adverse claimants, how far applicable as between vendor and purchaser.

Presumptions, however, such as are above referred to, would not necessarily be made as between vendor and purchaser (*n*); and the above cases must be considered as guides, rather than as authorities, for the conveyancer. In *Dowley* v. *Winfield*, in particular, the presumption, not only of the time but even of the fact of the death, (admitting for argument's sake its propriety for the purpose of enabling the Court to distribute testamentary assets) would evidently be of an extreme character if made upon a question of title. The mere fact of a young sailor, who deserted his ship in the Sandwich Islands, not being heard of for twelve years, can scarcely, as a matter of common sense, be considered to raise a stronger presumption of his death, than would the lapse of an equal interval of time in the case of any other person of the same age respecting whose existence no inquiry whatever had been made. In such cases the Court may be supposed to be (perhaps insensibly) influenced not only by a supposition that the party may be dead, but by the feeling that, if alive, he will probably never return to claim the property. It has, moreover, been observed by the same learned judge who decided *Dowley* v. *Winfield*, that the old presumption of death from absence, is, owing to the increased facilities of travelling, becoming daily more untenable (*o*). In one case, after absence and silence for nineteen years, the Court refused to presume death when the circumstances rendered it improbable that the party, if alive, would have communicated with her friends (*p*). The recent notorious litigation in respect to the Tichborne estates is suggestive of the diffi-

(*l*) See 5 Ch. 141, note.

(*m*) See *Phenés' Trusts*, 5 Ch. 139; and judgment of L. J. Giffard, *Re Lewes' Trusts*, 6 Ch. 356; *Re Rhodes*, W. N. (1887), 175.

(*n*) See Sug. 418.

(*o*) See *Watson* v. *England*, 14 Si. 28; *Hemming* v. *Spiers*, 15 Si. 550.

(*p*) *Bowden* v. *Henderson*, 2 S. & G. 360.

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culties which may surround a title which depends upon mere presumptive evidence of death.

Presumption as to survivorship.

There is no presumption of law arising from age or sex as to survivorship among persons who perish by the same casualty; nor, on the other hand, is there any presumption that they all died at the same moment. The question is one merely of fact, depending entirely upon the evidence; and if no evidence on the point can be adduced, the law treats the matter as incapable of being determined (*q*).

Presumption of failure of issue.

Failure of issue is a negative fact of which no evidence, strictly speaking, is capable of being given: all that can be done is to prove facts which raise a presumption of the want of issue: this proof, according to Mr. Hubback (*r*), may consist "either of the testimony of living witnesses having the means of knowledge (*s*), the declarations of deceased relatives, or family reputation otherwise established," and which appears to extend to indirect or circumstantial declarations (*t*), and (in conveyancing practice) to include declarations or affidavits by persons acquainted with, although not actually members of, the family (*u*); "or of facts or circumstances irreconcilable with, or opposed to, the hypothesis that there are any legitimate descendants of the supposed ancestor;" such as facts which tend to show the celibacy of the party (*v*); the non-mention of issue in wills (*x*) and other documents in which issue, if existing, would naturally be noticed; and the devolution of dignities or property upon the assumption of the want of issue; or the grant of letters of administration to distant relatives (*y*).

(*q*) *Wing* v. *Angrave*, 8 H. L. C. 183; and see *Underwood* v. *Wing*, 4 D. M. & G. 633; *Wollaston* v. *Berkeley*, 2 Ch. D. 213; and see *Ommaney* v. *Stilwell*, 23 B. 328, *ante*, p. 387.

(*r*) P. 203.

(*s*) As to which, see the case of *Hemming* v. *Spiers*, 15 Si. 550 (a case between vendor and purchaser); and the cases upon peerage claims, cited Hub. on Ev. p. 204.

(*t*) See cases on peerage claims, cited Hub. on Ev. p. 205.

(*u*) *Ibid.* 230.

(*v*) See *Hemming* v. *Spiers*, 15 Si. 550; *Re Webb's Estate*, 5 I. R. Eq. 235; *Re Hanby*, 25 W. R. 427.

(*x*) *Hungate* v. *Gascoyne*, 2 Ph. 25.

(*y*) See *Mullaly* v. *Walsh*, 6 I. R. C. L. 314, a case in which it was held that no presumption of failure of issue arose.

Presumption against aged females having future issue.

Many cases have occurred in which the Court of Chancery has paid out of Court money, the title to which depended upon the presumption that females of advanced age were incapable of having issue (*z*): the age of fifty appears to have been the earliest age at which the Court in any reported case has acted upon this presumption (*a*). The practice of Sir G. Jessel, M. R., was in all cases to require evidence that the menstrual periods had permanently ceased to recur. Lord St. Leonards appears to think that the presumption that a woman of advanced age is past childbearing would not be made against a purchaser (*b*); but in a recent case in Ireland (*c*), a title dependent on such a presumption was forced upon a purchaser: and upon general principles, it would seem that such a course would, if necessary, be adopted; it being a moral, and not a mathematical, certainty of a good title, which a purchaser can require from a vendor (*d*). The Courts do not appear to act upon a similar presumption in the case of a male (*e*), and there are obvious reasons why the doctrine should not be so extended.

(*z*) See *Leng* v. *Hodges*, Jac. 585; *Brown* v. *Pringle*, 4 Ha. 124, and earlier cases there cited; see the judgment in *Brandon* v. *Woodthorpe*, 10 B. 463, where the practice was admitted, although from other circumstances payment was refused. Forty-nine was held to be too early in *Re Overhill*, 17 Jur. 312; but see cases cited in next note.

(*a*) *Miles* v. *Knight*, 12 Jur. 666; *Edwards* v. *Tuck*, 23 B. 268, the woman being unmarried and fifty-eight; so in *Dodd* v. *Wake*, 5 De G. & S. 226, the woman being sixty-four; so in *Re Waddow's Trusts*, 11 Eq. 408, one of the parties being a widow aged fifty-five years and four months, who had never had any children, and the other a spinster, aged fifty-three years and nine months; so in *Re Milner's Estate*, 14 Eq. 245, case of a married woman aged forty-nine years and nine months, who had never had any child; and see, for further instances, *Groves* v. *Groves*, 12 W. R. 45; *Croxton* v. *May*, 9 Ch. D. 388; *Maden* v. *Taylor*, 45 L. J. Ch. 569; *Re Allason's Trusts*, 36 L. T. 653; *Davidson* v. *Kempton*, 18 Ch. D. 213; *Hodges* v. *Hodges*, 20 Ch. D. 752; *Graham* v. *Parsons*, W. N. 1885, 146; but in *Re Warren's Settlement*, 52 L. J. Ch. 928, the Court of Appeal refused an application where the husband was fifty-three, and had been married for twenty-eight years to the wife, who was fifty, without having children, and there was medical evidence that it was almost, if not entirely, impossible that she should have children.

(*b*) Sug. 418.

(*c*) *Browne* v. *Warnock*, 7 Ir. L. R. 3.

(*d*) *Lyddall* v. *Weston*, 2 Atk. 19; see *Hillary* v. *Waller*, 12 V. 252; and see *post*, p. 1231.

(*e*) See and consider *Trevor* v.

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Births, marriages, and death; proved by extracts from parochial and general registers.

The ordinary evidence of the facts of birth, marriage, and death (*f*), consists of certified extracts from the parochial registers, or from the general register, established by the 6 & 7 Will. IV. c. 86, and amended by the 1 Vict. c. 22: or, as regards deaths, from the burial registers established by the 16 & 17 Vict. c. 134, s. 8; and by declarations as to the identity of the parties. The parochial registers are not, as a general rule, evidence of the time or order of birth (*g*); although they may go far to enable the practitioner to form an opinion upon these points (*gg*); nor do they seem to be evidence of the time of death, except so far as by showing that it must have occurred before the date of the burial, of which they seem to be evidence (*h*); and they are evidence of the time as well as of the fact of marriage (*i*). Under the 6 & 7 Will. IV. c. 86, the birth or death, and not the baptism or burial, is the subject of registration; the date forms part of the entry required by the Act, and certified copies of the entries are to be received as evidence of the birth, death, or marriage, to which the same relate (*k*): it may, however, be doubted whether a purchaser could be compelled to accept a certificate of death as evidence of the fact, unless some sufficient reason were given for the non-production of the certificate of burial (*l*). Extracts from non-parochial registers have long been received by conveyancers as evidence; and

Trevor, 2 M. & K. 677; *Lushington* v. *Boldero*, 15 B. 2.

(*f*) As to recital of death of *cestui que vie* in renewed ecclesiastical lease being evidence, *vide ante*, p. 356.

(*g*) See *Doe* v. *Barnes*, 1 Mo. & R. 389.

(*gg*) See *Re Turner*, 29 Ch. D. 985.

(*h*) Hub. on Ev. 184.

(*i*) *Doe* v. *Barnes*, *suprà*. See 14 & 15 V. c. 97, s. 25, remedying errors in the solemnization in certain cases. As to the identification of extracts from the parochial registers, see 14 & 15 V. c. 99, ss. 14 and 17; *Re Porter's Trust*, 2 Jur. N. S. 349; *Re Neddy Hall's Estate*, 17 Jur. 29; incorrectly reported, 2 D. M. & G. 748.

(*k*) Sect. 38.

(*l*) See *Risely* v. *Shepherd*, 21 W. R. 782; *A.-G.* v. *Culverwell*, cited in Hub. on Ev. 769; and *Leach* v. *Leach*, 8 Jur. 211; but see *Parkinson* v. *Francis*, 15 Si. 160. In *Tomlins* v. *Tomlins*, 3 Jur. 167, Shadwell, V.-C., decided, that the certificate of a *district* registrar is not evidence under the Act; in the later case of *Trail* v. *Kibblewhite*, 10 Jur. 107, the same learned Judge is stated to have acted upon such a certificate; but his attention does not seem to have been directed to the distinction between a District Registrar's, and the Registrar General's certificate.

by the 3 & 4 Vict. c. 92, the non-parochial registers deposited under the provisions of that Act (*m*), and certified extracts therefrom (*n*), are made evidence in the Courts of Law and Equity (*o*).

How otherwise proved; —by declarations, &c.;

In the absence of evidence of the above description, resort is necessarily had to evidence of a less formal character: such as declarations by members of the family (*p*), whether such declarations be made expressly for the purpose of evidence, or consist of recitals in deeds or wills, statements in pleadings in Chancery, &c. The declaration of a wife as to the state of her husband's family is equally admissible with that of a husband as to the state of his wife's family (*q*); but before such a declaration can be admitted in evidence, the relationship of the declarant *de jure* by blood or marriage must be established by testimony independent of the declaration itself (*r*). Such evidence is inadmissible in Court during the lifetime of the parties; but in conveyancing, statutory declarations form the only available means of preserving the testimony of living witnesses, and, after their deaths, become, subject to the rules relating to declarations of deceased persons, admissible in Court; and where such declarations by relations cannot be procured, conveyancers act upon similar declarations made by strangers who have been acquainted with the family, although such declarations are inadmissible in Court (*s*), unless made contrary to the pro-

(*m*) For a list of which, see Hub. on Ev. p. 772.

(*n*) See sects. 11 and 13.

(*o*) Attested copies of French registers were received in a modern peerage case, upon the evidence of a French advocate that the registers were kept according to the French law, and would be received in the French Courts: *Perth Earldom*, 2 H. L. C. 865. See 14 & 15 V. c. 99, s. 7.

(*p*) See the remarks of Lord Langdale upon the little value to be attributed to traditionary evidence in pedigree cases, in *Johnston* v. *Todd*, 5 B. 597; and see *Crouch* v. *Hooper*, 16 B. 182; *Webb* v. *Haycock*, 19 B. 342.

(*q*) *Shrewsbury Peerage case*, 7 H. L. C. 1.

(*r*) *Plant* v. *Taylor*, 7 H. & N. 211; and see 1 Tayl. Ev. 564; *Smith* v. *Tebbitt*, L. R. 1 P. & D. 354. As to what is meant by "blood relations" within the meaning of this rule, see 1 Tayl. Ev. 560.

(*s*) *Johnson* v. *Lawson*, 2 Bing. 86; *Crease* v. *Barrett*, 1 C. M. & R. 928; *Casey* v. *O'Shaunessy*, 7 Jur. 1140.

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records of Heralds' College;

entries in books, &c.;

old pedigrees;

inscriptions, &c.

prietary or pecuniary (*t*) interest of the declarant. So, records or books from the Heralds' College are admitted as evidence, but only in so far as they contain information obtained by inquiries made under the judicial authority of the Heralds *i. e.*, information obtained by the Heralds in the course of their visitations (*u*): so, statements of pedigree contained in letters, or entries in books, whether religious or otherwise (*v*), are admissible in Court, if the handwriting be proved to be that of a deceased member of the family (*y*): so also, old statements of pedigree are held admissible, on account of their public exposure to and recognition by the family, even although they cannot be distinctly attributed to any particular member of it; *e.g.*, inscriptions on monuments or tombstones (*z*), an authenticated copy of a mural inscription in the parish church (*a*), coffin plates (*b*), inscriptions upon portraits or on the walls of the mansion house (*c*), engravings on rings (*d*); hatchments (*e*); pedigrees hung up in the mansion (*f*), or preserved in the family library (*g*), entries in a family Bible, or, it would appear, in any other book which

(*t*) See *Sussex Peerage case*, 11 C. & F. 85, 112; *Lloyd* v. *Wait*, 1 Ph. 61.

(*u*) *De L'Isle Peerage*, 228; *Shrewsbury Peerage case*, 7 H. L. C. 1, 24. As the last of these visitations took place in 1687, any later books are apparently inadmissible; see *Sturla* v. *Freccia*, 5 Ap. Ca. 623, 644.

(*v*) See *Herbert* v. *Tuchal*, T. Raym. 84; *Berkeley Peerage case*, 4 Camp. 418; *Slane Peerage case*, 5 C. & F. 24; *Tracy Peerage*, 10 C. & F. 154; but see *Walker* v. *Lady Beauchamp*, 6 C. & P. 552.

(*y*) As to proof of which, see *The Fitzwalter Peerage*, 10 C. & F. 193; *Tracy Peerage*, 10 C. & F. 154.

(*z*) See Peerage Cases, cited Hub. on Ev. 688; and see 10 C. & F. 154; *Shrewsbury Peerage case*, 7 H. L. C. 1; *Monkton* v. *A.-G.*, 2 R. & M. 163; *Goodright* v. *Moss*, 2 Cowp. 594. The value of such evidence cannot, however, be put higher than this, that its publicity gives it a *quasi*-authenticity, so that if it remain uncontradicted for many years it will be taken to be true in the absence of evidence to the contrary; *Haslam* v. *Cron*, 19 W. R. 968.

(*a*) *Slaney* v. *Wade*, 1 M. & C. 338; and see *In re Perth Earldom*, 2 H. L. C. 876.

(*b*) *Chandos Peerage*, 10; *Rokeby Peerage*, 4; *Lovat Peerage*, 77; Hub. on Ev. 693. Coffin plates and monumental inscriptions frequently misstate the age by reducing it a year: *anno ætatis* being undertakers' Latin for *aged*.

(*c*) *Camoys Barony*, 6 C. & F. 801.

(*d*) *Fowles* v. *Young*, 13 Ves. 144.

(*e*) *Hungate* v. *Gascoigne*, 2 C. P. Coop. t. Cott. 414.

(*f*) See *Slaney* v. *Wade*, 1 M. & C. 356.

(*g*) *Camoys Barony*, 6 C. & F. 802; and see *Davies* v. *Lowndes*, 7 Sc. N. R. 141; and *In re Perth Earldom*, 2 H. L. C. 876.

had been treated by the family as being in the nature of a family register (*h*); and, if coming from proper custody, no evidence of their authorship or handwriting is required (*i*); so, also, a pedigree presented by a third person to a member of the family, and recognised by him, is admissible in proof of the relationship of persons therein described as living, and who might be presumed to be personally known to him, even although the general pedigree be inadmissible by reason of its purporting to be collected from registers, wills, &c., and *history* (*k*): but a printed collection of monumental inscriptions was rejected as evidence of what had been the inscription on a partly-defaced tomb (*l*): so, a case for the opinion of counsel seems to be inadmissible, as being generally drawn by the solicitor and not by the party himself, and being often framed with a view to drive the opposite party to a reference, or for other purposes (*m*).

Whether admissible in proof of collateral matters.

And it seems probable that such evidence is admissible to prove not only the facts of birth, marriage, and death, but also such collateral matters (*e.g.*, the local derivation of the family) as tend to show the identity of the parties (*n*).

Such declarations must be made "*ante*

All such evidence is generally inadmissible if made during existing (*o*), or with a view to anticipated (*p*), litigation or

(*h*) See *Monkton* v. *A.-G.*, 2 R. & M. 162; *Hood* v. *Beauchamp*, 8 Sl. 26; *Slane Peerage case*, 5 C. & F. 24; *Berkeley Peerage case*, 4 Camp. 418; *Goodright* v. *Moss*, 2 Cowp. 591.

(*i*) *Hubbard* v. *Lees*, L. R. 1 Ex. 255.

(*k*) *Davies* v. *Lowndes*, 7 Sc. N. R. 141, 208 *et seq.*

(*l*) *Shrewsbury Peerage case*, 7 H. L. C. 1. A photograph of a subsequently defaced inscription would probably be now received in evidence.

(*m*) *Slane Peerage*, 5 C. & F. 40.

(*n*) See *Shields* v. *Boucher*, 1 De G. & S. 40, and cases there cited; and *Doe* v. *Davies*, 10 Q. B. 314; *Lloyd* v. *Wait*, 1 Ph. 61; *Betty* v. *Nail*, 6 Ir. C. L. R. 17; and see *Re Perton*, 53 L. T. 707. But such evidence is admissible only in proof of geneological facts or of pedigrees, and not of title; *Shields* v. *Boucher*, *suprà*; and see *Smith* v. *Smith*, 10 I. R. Eq. 273; *Haines* v. *Guthrie*, 13 Q. B. D. 818.

(*o*) *Reilly* v. *Fitzgerald*, 6 Ir. Eq. R. 348; Dru. 153; see 1 Taylor, 554.

(*p*) *Slane Peerage*, 5 Cl. & F. 23. To be admissible the document must be a spontaneous family declaration made before any question has arisen: and therefore a deposition in the form of an affidavit, although not sworn, is *ipso facto* inadmissible; *Hill* v. *Hibbit*, 19 W. R. 250; and see *Dysart Peerage*, 6 Ap. Ca. 489.

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Litem motam" —extent of the rule.

controversy involving the point in question: it seems, however, that the mere fact of the declarant having a distinct object in view in making his declaration, *e.g.*, the prevention of disputes in a family, will not render the declaration inadmissible, although such object can only be gained by using the declaration in evidence (*q*): and, in a peerage case cited by Mr. Hubback (*r*), a pedigree transmitted by a father to his son, with a view to induce him to make a claim to the peerage, which, however, never was made, was held admissible as evidence in favour of a party claiming through an elder branch of the family.

What is a *lis mota?*

It seems to be now settled that, to constitute a "*lis mota*," there must be not merely the existence of facts which may lead to a suit, but an actual controversy: and also, if a controversy exist, it must be on the very point in respect of which the declarations are sought to be used (*s*). It was held in *Slaney* v. *Wade* (*t*), that a copy of an ancient mural inscription was not rendered inadmissible in evidence by reason of its having been made at the time when it was known that, on the death of a tenant for life of the family estates, questions would possibly arise as to who was entitled under a limitation in a will to the testator's right heirs.

Old judgment.

A verdict or judgment upon the matter directly at issue, although the suit in which it was given was between other parties, is good evidence of an adjudication by a competent tribunal upon the state of facts and the question of usage at that time, and is admissible wherever evidence of reputation is received (*u*).

(*q*) See *Monkton* v. *A.-G.*, 2 R. & M. 164; *Berkeley Peerage case*, 4 Camp. 418; *Slaney* v. *Wade*, 1 M. & C. 338.

(*r*) *Airth Earldom*, Hub. on Ev. 668.

(*s*) *Shedden* v. *Patrick*, 2 Sw. & Tr. 170, 188, following *Reilly* v. *Fitzgerald*, Dru. 122, and *Davies* v. *Lowndes*, 7 Sc. N. R. 198, which together must be taken to have overruled *Walker* v. *Countess Beauchamp*, 6 C. & P. 552.

(*t*) 1 M. & C. 338.

(*u*) *Pim* v. *Curell*, 6 M. & W. 234; *Neill* v. *Duke of Devonshire*, 8 Ap. Ca. 135, 147; and see *Re Manor of Walton-cum-Trimley*, 21 W. R. 475.

Declaration by party in the like interest admissible.

A declaration is not rendered inadmissible in evidence by reason of the declarant, and the party relying on his declaration, having been in the same situation with respect to the matter in question (*x*).

Recitals, when evidence of pedigree.

And, as against third parties (*y*), recitals in a deed are not evidence, unless the deed was executed by some disinterested member of the family (*z*), and even then only on the footing of declarations or admissions. In a case where a conveyance by parties claiming as heiresses of the bodies of two female joint-tenants in tail recited their pedigree, this recital of their title by the then vendors was held to be no evidence against a subsequent purchaser, although the deed was thirty years old; there being nothing to show that the previous possession had been consistent with the pedigree (*a*): but in an ejectment case, where a person entitled in remainder joined with the tenant for life (who was her relation) in selling the property, and the conveyance recited that she was the daughter of J. D., and the conveyance was executed by the tenant for life, the recital was held by the Court of Queen's Bench to be evidence of the fact "no dispute having existed, and the parties having done that which they had a right to do if members of the family" (*b*).

Recitals in private Acts of Parliament.

By the 37 & 38 Vict. c. 78 (*c*), recitals, &c., in Acts of Parliament twenty years old are, as between vendor and purchaser, made sufficient evidence of the truth of the facts and matters stated, except so far as they may be disproved; and apparently, there is no distinction between a public and a private Act as regards the application of this rule. Except so far as it may have been altered by this enactment, the general rule is that recitals in recent private Acts of Parliament

(*x*) *Monkton* v. *A.-G.* 2 R. & M. 157; *Doe* v. *Tarver*, Ry. & Mo. 141; *Freeman* v. *Phillipps*, 4 M. & S. 486, 491.

(*y*) Including persons named as parties, but who do not execute; see *Tull* v. *Owen*, 4 Y. & C. 192.

(*z*) *Slaney* v. *Wade*, 1 M. & C. 338 (but see the judgment of the V.-C. *contrà*, 7 Si. 614); see *Doe* v. *Davies*, 10 Q. B. 314, 325; and see now 37 & 38 V. c. 78, sect. 2.

(*a*) *Fort* v. *Clark*, 1 Russ. 601.

(*b*) *Doe* v. *Davies*, 10 Q. B. 314.

(*c*) See sect. 2.

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are not evidence of the facts stated in them, inasmuch as it is no longer the practice to submit the evidence in support of private bills to the judges for their report upon it (*d*). The Court of Chancery has refused to act upon the recital of a death in a private Act on the application of a person claiming under the Act (*e*).

Land tax—redemption of, how proved.

Land tax, if not noticed in the agreement, is presumed to be a charge on the property; if stated to be redeemed its redemption should be shown by the certificate of the Commissioners, the receipt of the cashier of the Bank of England, and memorandum of registration (*f*): the loss of the receipt is not, however, of any real importance; for, as a matter of practice, the certificate is never issued before the money is paid. In one case (*g*), where an estate was described as land-tax redeemed, a statutory declaration by a former owner that no land tax had been paid in respect of the land, "subsequently to the purchase *or* redemption thereof, in or about the year 1799," was held insufficient to satisfy a purchaser; for it left it doubtful whether the land tax ever was redeemed, so as to free the land from liability either to the Crown or to a purchaser under the 42 Geo. III. c. 116,

(*d*) *Shrewsbury Peerage case*, 7 H. L. C. 1.

(*e*) *Cowell* v. *Chambers*, 21 B. 619; *Moulton* v. *Edmonds*, 1 D. F. & J. 216.

(*f*) See 42 Geo. III. c. 116, s. 38. See as to sales for redemption of the tax, *Hicks* v. *Morant*, 5 Bl. N. S. 613; *S. C.*, 2 Dow & C. 411; *Laurie* v. *Lawrie*, 2 Dow 556. As to the right of a remainderman to pay off the representatives of a tenant for life who redeemed the land tax out of his own money, see *Cousins* v. *Harris*, 12 Q. B. 726. As to merger of redeemed land tax, see *Blundell* v. *Stanley*, 3 D. G. & S. 433; *Bulkeley* v. *Hope*, 1 K. & J. 482; *Neame* v. *Moorsom*, 3 Eq. 91; when redeemed by ecclesiastical incumbent, *Kilderbee* v. *Ambrose*, 10 Ex. 454. It should be remembered that land tax redeemed by a person having a limited interest under 38 Geo. III. c. 60, or under 12 Geo. III. c. 116, s. 123, is personal estate; but a fee farm rent in lieu of land tax, purchased under 12 Geo. III. c. 116, is real estate. Under 16 & 17 V. c. 117, s. 2, merger took place in every case of redemption under a contract entered into after the 20th August, 1853; but as regards contracts entered into after the 29th July, 1856, this section was repealed by 19 & 20 V. c. 80, s. 3. A subsequent inclosure of waste lands of a manor will not revive the land tax, if it has been previously redeemed; *Hodgson* v. *Pearson*, 31 L. T. 679.

(*g*) *Buchanan* v. *Poppleton*, 4 C. B. N. S. 40.

or his representatives: and in the same case it was also held, that a statement in the operative part of a conveyance that the consideration was for the absolute purchase of the land "free from land tax," did not fall within the usual condition making deeds of a specified age conclusive evidence of everything recited or stated therein. On an exchange of lands under the General Inclosure Act (*h*), the liability to land tax is not transferred from the property exchanged to that taken in exchange (*i*), and the site of an ancient hospital, which was exempt as such, retains the exemption, although the hospital has been removed to another site, and the land discharged from the charitable trusts (*k*).

Tithes.

Tithe, also, is a burden the existence of which is presumed in the absence of agreement. The Law upon the subject is rapidly becoming less important under the provisions of the Tithe Commutation Acts (*l*): the Commissioners acting under which have power, in making their award (*m*), to decide, as

(*h*) 6 & 7 Will. IV. c. 115.

(*i*) *Cooch* v. *Walden*, 46 L. J. Ch. 639.

(*k*) *Cox* v. *Rabbits*, 3 Ap. Ca. 473.

(*l*) 6 & 7 Will. IV. c. 71; and see supplementary Acts, 7 Will. IV. & 1 V. c. 69; 1 & 2 V. c. 64; 2 & 3 V. c. 62; 3 & 4 V. c. 15; 5 V. c. 7; 5 & 6 V. c. 54; 9 & 10 V. c. 73; 10 & 11 V. c. 104; 14 & 15 V. c. 53; 23 & 24 V. c. 81; 25 & 26 V. c. 73; and see the important additional provisions contained in 23 & 24 V. c. 93; and see 31 & 32 V. c. 89; 41 & 42 V. c. 42; and 48 & 49 V. c. 32. The tithe, or commutation rent-charge, may, under the 6 & 7 Will. IV. c. 71, s. 71, be merged by the tenant in fee or in tail thereof; or, under 1 & 2 V. c. 64, by any person or persons seised of, or having power to acquire, the fee therein, sect. 1; or by tenant for life in possession of both land and tithe, &c., sect. 3; and the merger may be effected in copyholds, sect. 4; or, under 2 & 3 V. c. 62, s. 6, by persons holding glebe or other lands, and the tithes, &c., by virtue of any benefice, or *ex officio*. By sect. 1 of the same Act, incumbrances upon merged tithes, &c. are made primary charges on the lands themselves: and by the 9 & 10 V. c. 73, s. 19, the powers of merger given by former Acts are extended, retrospectively and prospectively, so as to give equitable owners a power of legal merger, but so as to make charges on the tithe, &c. primary charges on the land. The 7th section of 2 & 3 V. c. 62, provides that the merger of tithes or rent-charge issuing out of copyhold lands shall not be deemed to increase the value of the lands for the purpose of assessing the fines.

(*m*) And which, if purporting to be sealed with the seal of the Commissioners, is made evidence by sect. 2 of 6 & 7 Will. IV. c. 71.

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Commutation of, under late Acts.

Decision of Commissioners conclusive, if no appeal.

between tithe owner and land owner (*n*), but not as between rival claimants of tithe (*o*), all questions as to the existence of any modus, or composition real or prescriptive, or customary payment, or any claim of exemption from or non-liability to payment of tithes (*p*); and their decision, unless reversed on an appeal brought within three calendar months after its being notified in writing to the parties interested, or their agents (*q*), is binding and conclusive: and no further time will be allowed by reason of the benefice becoming vacant, after the commencement but before the expiration of the three months (*r*). There are exceptions of tithes of fish and fishing, and of mineral tithes (*s*), of payments instead of tithes in the City of London, and of permanent rent-charges payable in any city or town by custom or any local Act of Parliament (*t*); but, with these exceptions, all questions as to the existence or amount of liabilities of this description will eventually depend, and do already as respects a great part of the country depend, upon the Commissioners' award (*u*) for the particular district.

As to liability under special apportionments.

It must be borne in mind that under the 58th section of the 6 & 7 Will. IV. c. 71, the commutation rent-charge may be specially apportioned; so as to throw the amount attributable to the tithes of an entire estate upon some particular portion of it in exoneration of the residue; but the sum payable under the Act in lieu of tithes, is not a charge on the inheritance such as to entitle the owner of the rent-charge to sell the land out of which it issues for satisfaction of arrears (*x*). Of course when there has been an apportionment, the contract or conditions should

(*n*) See *Walker* v. *Bentley*, 9 Ha. 629, 635.

(*o*) *Reg.* v. *Tithe Commissioners*, 15 Q. B. 620.

(*p*) 6 & 7 Will. IV. c. 71, s. 45; see *Wetherell* v. *Weighill*, 3 Y. & C. 243; and see 5 & 6 V. c. 54, s. 10; *Reg.* v. *Tithe Commissioners*, 14 Q. B. 459; 18 Q. B. 156; *Shepherd* v. *Lord Londonderry*, 18 Q. B. 145.

(*q*) Sect. 46.

(*r*) *Humfray* v. *Scroope*, 13 Q. B. 509.

(*s*) As to what minerals are tithe-able, see Cruise, tit. 22, s. 47.

(*t*) Sect. 90.

(*u*) 6 & 7 Will. IV. c. 71, ss. 52 and 67; and see 2 & 3 V. c. 62, s. 8.

(*v*) *Bailey* v. *Badham*, 30 Ch. D. 84.

As to extraordinary charges on hop grounds, orchards, and gardens.

state either the fact or the amount actually payable. It must also be remembered in cases where any lands in a parish have been cultivated as hop grounds, orchards, or market gardens, that the Commissioners may (under sect. 10) have assigned a district within which all lands so cultivated are to be subject to an extraordinary *acreage* charge in addition to the ordinary charge which affects them as comprised in the titheable parts of the parish: and that lands within such a district, although waste and unproductive at the date of award, or even if relieved from the ordinary charge by an apportionment under the 58th section, become under the 42nd section subject to this extraordinary charge upon their being subsequently brought under any of the above special modes of cultivation (*y*): and although it was held prior to the passing of a recent Act (*z*), that as facts arose which warranted such a proceeding, a supplemental award assigning such a district might at any time be made by the Commissioners (*a*), this power has been taken away by the last-mentioned Act (*z*).

Composition, modus, or exemption, how proved.

As respects those localities in which the tithe has not yet been commuted, it may be sufficient to state shortly, that a composition real can be established only by direct or presumptive proof of its creation by deed before the 13 Eliz. (*c*); and that before the passing of the 2 & 3 Will. IV. c. 100, a modus could be established only by similar proof of its constant payment from the time of legal memory (*d*); and that to prove an exemption from tithe, it was necessary to show that the land had belonged to one of the greater monasteries, and was held by such monastery discharged from tithe at the time of its dissolution (*e*). By the 2 & 3 Will. IV. c. 100, a modus (*f*) or exemption may be absolutely established as

Proof of, how far facilitated by 2 & 3 Will IV. c. 100.

(*y*) *Walsh* v. *Trimmer*, L. R. 2 H. L. 208.

(*z*) 36 & 37 Vict. c. 42; see sect. 1.

(*a*) *Russell* v. *Tithe Comm.*, L. R. 6 C. P. 596.

(*c*) See *Estcourt* v. *Kingscote*, 4 Mad. 140, *Dent* v. *Rob*, 1 Y. & C. 1.

(*d*) See *Salkeld* v. *Johnston*, 1 M. & G. 261.

(*e*) *Salkeld* v. *Johnston*, 1 Ha. 203; S. C. 1 M. & G. 261; and *Barnes* v. *Stuart*, 1 Y. & C. 119.

(*f*) A custom for the lord of a manor to receive a tenth of all tithe-

against the Crown or Duchy of Cornwall, or any lay person, (not being a corporation sole,) or any corporation aggregate, whether spiritual or temporal, by proof of payment of the modus, or enjoyment of the land free from tithe, during sixty years next before the time of the demand; and as against any corporation sole, by proof of such payment or enjoyment during two successive incumbencies, (or sixty years, whichever shall be the longer period,) and three years after the appointment and institution or induction of a third incumbent (*h*): but the Act does not extend to cases where the modus or enjoyment can be referred to an agreement in writing, or where the enjoyment has not been *as of right* (*i*): and in cases where, at the date of the Act, the tithes were in lease by deed, or subject to a temporary composition in writing, a period of three years is allowed to the tithe owner after the determination of the term of demise or composition (*k*); and the time during which the lands are held by the tithe owner is excluded from the period of computation (*l*). It was, after opposite judicial decisions (*m*), decided by Lord Cottenham, C., in conformity with the opinions of eight of the twelve judges, that, in order to bring land within the operation of the above Act for the purpose of claiming an exemption from tithe, it is not necessary to prove its original capacity for exemption by showing that it belonged to one of the greater monasteries (*n*). The Act, it may be observed, does not prevent a party from pleading a modus from time immemorial, and proving it by the same evidence as he might

able matters in the manor, and to pay a yearly sum to the rector in lieu of tithe, is not within the statute; see *Marquis of Waterford* v. *Knight*, 11 C. & F. 653; *Thorpe* v. *Plowden*, 14 M. & W. 520; *Young* v. *Clare Hall*, 17 Q. B. 529.

(*h*) Sect. 1; see as to evidence under this section, *Stamford (Earl of)* v. *Dunbar*, 13 M. & W. 822; *Pearson* v. *Beck*, 21 L. T. O.S. 21; the shorter period of thirty years during which there is only a *primâ facie* and not an absolute claim, does not appear to be material as between vendor and purchaser; see sect. 6 of Act.

(*i*) *Salkeld* v. *Johnston*, 2 Ex. 256, 286.

(*k*) Sect. 4.

(*l*) Sect. 5.

(*m*) See *Salkeld* v. *Johnston*, 1 Ha. 196; *S. C.*, 2 C. B. 749; 2 Ex. 256; *Fellowes* v. *Clay*, 4 Q. B. 313.

(*n*) *Salkeld* v. *Johnston*, 1 M. & G. 242; see *Dean of Ely* v. *Bliss*, 2 D. M. & G. 469.

have done before the statute; nor does it apply to claims for statutory tithes in the City of London (*o*).

Tithes, how affected by Statute of Limitations.

The 3 & 4 Will. IV. c. 27, s. 2, which enacts that no person shall bring an action to recover any land (which by section 1 includes tithes, unless belonging to a spiritual or eleemosynary corporation sole) but within twenty years next after the right accrued, was held, by the Court of Exchequer, not to prevent the tithe owner from recovering tithes as chattels from the occupier, although none have been set out for twenty years; but to be confined to cases where there are two parties claiming adverse estates in the tithes (*p*). A recent decision (*q*) of the House of Lords has set at rest a doubt which had long been entertained as to whether a tithe rent charge is "rent" within section 1 of the Statute of Limitations (*r*), or a composition within the exception in the section.

Defects in title, when supplied by Prescription Act, and Statute of Limitations.

Defects in the early title, or in the evidence thereof, are occasionally rendered immaterial by the 2 & 3 Will. IV. c. 71, and 3 & 4 Will. IV. c. 27.

Nature of title under Prescription Act.

With general reference to the former (commonly known as the Prescription Act), we may observe that, except in the case of the right to light, there is nothing in the Act which interferes with a claim to an easement by express grant; or which prevents a claimant from proceeding according to the Common Law, if he elects to do so. The enjoyment of the right must be for the whole statutory period in the character of an easement, as distinct from the land on which it is sought to be imposed (*s*); and, except in the case of an easement of necessity, the right, if acquired, is extinguished by an union of the ownership of the dominant and servient tenements, for estates of an equally high and perdurable nature (*t*);

(*o*) *Esdaile* v. *Payne*, 33 W. R. 864.

(*p*) *Salkeld* v. *Johnston*, 2 Ex. 256. Compare the Real Property Limitation Act, 1874 (37 & 38 V. c. 57), s. 9.

(*q*) *Irish Land Commission* v. *Grant*, 10 Ap. Ca. 14.

(*r*) 3 & 4 W. IV. c. 27.

(*s*) *Harbridge* v. *Warwick*, 3 Ex. 552; and see and consider *Ladyman* v. *Grave*, 6 Ch. 763.

(*t*) See Co. Litt. 313 a; *Thomas* v. *Thomas*, 2 C. M. & R. 41; *Simper* v. *Foley*, 2 J. & H. 555.

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though it is only suspended where the estates are not of the same duration, and will revive on their severance (*u*). The Act is retrospective in its operation, so as to include in the computation of the times necessary to confer the statutory title a period of enjoyment prior to the passing of the Act (*v*): but each of the respective periods must be deemed and taken to be the period next before some suit or action, wherein the claim or matter to which such period may relate shall have been or shall be brought in question (*x*). It may be observed that a user which is neither capable of interruption nor actionable cannot be the foundation of an easement (*y*).

As to claims of light.

A claim to light becomes absolute and indefeasible after twenty years' uninterrupted enjoyment; unless such enjoyment be shown to have been by virtue of some consent or agreement, expressly made or given for that purpose by deed or writing (*z*); and local customs to the contrary are expressly rendered inoperative (*a*). Where reliance is placed on the statute, the title to light, acquired thereunder, now depends entirely on positive enactment, and is no longer to be rested on the fiction of a presumed grant or licence from the

(*u*) *Simper* v. *Foley*, 2 J. & H. 555; and cases there cited; and cf. *Ladyman* v. *Grave*, 6 Ch. 763.

(*v*) *Simper* v. *Foley*, *supra*.

(*x*) Sect. 4.

(*y*) *Sturges* v. *Bridgman*, 11 Ch. D. 852; and cf. *Webb* v. *Bird*, 13 C. B. N. S. 841; *Chasemore* v. *Richards*, 7 H. L. C. 349; *Bryant* v. *Lefever*, 4 C. P. D. 172; *Dalton* v. *Angus*, 6 Ap. Ca. 740.

(*z*) Sect. 3. As to the form and requisites of such an agreement, see *Bowley* v. *Atkinson*, 13 Ch. D. 283, and *Judge* v. *Lowe*, 7 I. R. C. L. 291. As to the onus of proof and forms of rebutting evidence, see *Seddon* v. *Bank of Bolton*, 19 Ch. D. 462.

(*a*) *Salters' Co.* v. *Jay*, 3 Q. B. 109; *Truscott* v. *Merchant Taylors' Co.*, 11 Ex. 855; and see *Yates* v. *Jack*, 1 Ch. 295; *Curriers' Co.* v. *Corbett*, 2 Dr. & S. 355; *Heath* v. *Bucknall*, 8 Eq. 1. The right to light may, however, be taken away by Act of Parliament, empowering another to erect buildings which will destroy or affect the light. In such a case the only remedy open to the party injured is under sect. 68 of the L. C. C. Act; *Clark* v. *London School Board*, 9 Ch. 120; *Duke of Bedford* v. *Dawson*, 20 Eq. 353; *Badham* v. *Marris*, 45 L. T. 579, a case under sect. 20 of Artizans' Dwelling Act; *Wigram* v. *Fryer*, 36 Ch. D. 87. But rights to light and other easements are not extinguished by the mere purchase by a railway company under compulsory powers of the servient tenement, but still exist unless compensated for, and revive on a re-sale to an individual; *Ellis* v. *Rogers*, 29 Ch. D. 661; and see *Bird* v. *Egglton*, *ib.* 1012.

adjoining proprietor (*b*). Where, however, the provisions of the statute are inapplicable, *e.g.* where there has been recent unity of possession, as distinguished from title, and it can be proved that before such unity commenced the access of light has been enjoyed as far back as living memory goes, a title will be deemed to be established independently of the statute, for the statute has not taken away any mode of claiming the easement which existed before its passing in cases which do not come within its provisions (*c*). It is, however, conceived that in cases to which those provisions apply the statute has altogether superseded the Common Law, and that the decision in *Lanfranchi* v. *Mackenzie* (*d*) cannot be upheld. The enjoyment of this easement need not be as of right; nor is there any reservation of the rights of reversioners (*e*); and, so as there be no adverse interruption, an unbroken continuity of enjoyment is not necessary to establish the right; thus, if after the statutory period has commenced to run, but before the twenty years have elapsed, there is an interval during which the owner of the dominant tenement, or his occupying tenant, is also in the occupation of the servient tenement, the operation of the statute is for the time suspended, but revives on the severance of the unity of occupation; and the statutory period may be made up partly of the period immediately prior to the unity of occupation and partly out of the period immediately succeeding it (*f*). Where it is acquired against the owner of a leasehold interest in the servient tenement, it is acquired also against the owner of the reversion (*g*).

Whether right lost by enlargement or alteration of ancient windows.

In order to establish the right there must, it is conceived, be some *building* in respect of which it can be claimed (*h*); but when once acquired, it will not be lost by an enlarge-

(*b*) *Truscott* v. *Merchant Taylors' Co.*, 11 Ex. 855, per Coleridge, J.; *Tapling* v. *Jones*, 11 H. L. C. 290, Lord Westbury's speech.

(*c*) *Aynsley* v. *Glover*, 10 Ch. 283.

(*d*) 4 Eq. 421.

(*e*) Sect. 8.

(*f*) *Ladyman* v. *Grave*, 6 Ch. 763.

(*g*) *Simper* v. *Foley*, 2 J. & H. 555; *Ladyman* v. *Grave*, *supra*.

(*h*) See *Roberts* v. *Macord*, 1 Mo. & R. 230; where, however, it was not necessary to decide the point. In *Harris* v. *De Pinna*, 33 Ch. D. 238, Chitty, J., held that a timber stage was not a building within the Act; but the C. A. left the point undecided.

ment or alteration of the ancient windows (*i*); nor by the destruction of the dominant tenement, whether by some casualty, or by the voluntary act of its owner, unless there is evidence of an intention to abandon the right; as, *e.g.*, by not rebuilding the house within a reasonable period (*k*): nor, on rebuilding, is it absolutely necessary that the new windows should be identical in situation or dimensions with those which previously existed, if there is no material change in the nature or in the *quantum* of the servitude imposed (*l*), and if the area of the new window is substantially coincident with the area of the old (*m*); nor does the fact that the owner of the dominant tenement has within the statutory period acquired by the removal of buildings a larger quantity of light than he previously had, entitle the owner of the servient tenement to obstruct the excess of light (*n*). It has been held that where the owner of ancient lights has replaced them by larger windows, the Court will not restrain the owner of the servient tenement from obstructing them, but will leave the plaintiff to his remedy at Law (*o*); but, in later cases, this decision has been disapproved; and it appears to be now well settled that the mere fact that an owner of ancient lights has enlarged them, does not disentitle him to an injunction to restrain the servient owner from obstructing them (*p*). According to this doctrine, which is the logical consequence of holding that an alteration is not *per se* an abandonment of the easement, if the owner of a small ancient light convert it into a large window, which cannot be

(*i*) *Tapling* v. *Jones*, 11 H. L. C. 320, overruling *Renshaw* v. *Bean*, 18 Q. B. 112; *Hutchinson* v. *Copestake*, 8 C. B. N. S. 102; and *Newson* v. *Pender*, 27 Ch. D. 43; see also *Foulers* v. *Walker*, 51 L. J. Ch. 443.

(*k*) *Moore* v. *Rawson*, 3 B. & C. 337, 341. The owner of the site of a demolished building, which formerly enjoyed the right, can restrain a neighbouring owner from so building as to interfere with such light as he would be entitled to on building on the vacant site; *Ecclesiastical Commrs.* v. *King*, 14 Ch. D. 213; *Staight* v. *Burn*, 5 Ch. 163; and see *Scott* v. *Pape*, 31 Ch. D. 554, 575.

(*l*) *The Curriers' Co.* v. *Corbett*, 2 Dr. & S. 358; but see *Cherrington* v. *Abney*, 2 Vern. 646; and *Aynsley* v. *Glover*, 18 Eq. 544; 10 Ch. 283.

(*m*) *Newson* v. *Pender*, 27 Ch. D. 43.

(*n*) *Dyers' Company* v. *King*, 9 Eq. 438; *National Provincial Ins. Co.* v. *Prudential Ins. Co.*, 6 Ch. D. 757.

(*o*) *Heath* v. *Bucknall*, 8 Eq. 1.

(*p*) *Aynsley* v. *Glover*, 18 Eq. 544; 10 Ch. 283; and see *Staight* v. *Burn*, 5 Ch. 163, 167.

obstructed without blocking the access of light, previously enjoyed, through the space or aperture of the old window, he will after the lapse of the statutory period acquire, in respect of the enlarged window, the prescriptive right which he originally had only in respect of the smaller one; and will in the meantime be able to prevent any obstruction, on the part of the owner of the servient tenement, which may interfere with the acquisition of the right. The most recent case on this subject (*q*) has extended the doctrine of the older authorities, and has laid down that "the access and use of light" to which, under the 3rd section, a person acquires an indefeasible title by enjoyment for twenty years is the access and use of the particular cone, or pencils of light, which has during that period passed over the servient to the dominant tenement. It follows that the right is not lost by an alteration either in the structure or position of the building for which the right is claimed, provided only that the new or altered building is so constructed as to enjoy some part at any rate of the cone of light enjoyed by the former building. Within this limit neither setting back (*r*), nor advancing (*s*), the site of the old building will destroy the right. The result of this doctrine seems to be, that abandonment of the right can only arise by substituting for the old building a structure which has no windows (*t*), or rather, it is conceived, no aperture (*u*) which intercepts any portion whatever of the light which formerly fell upon the old windows or any of them. But it may be that where there has been no abandonment, the person who claims the right to light may yet be unable to enforce it, from want of evidence as to the character of the right which he claims (*x*).

As to the extent to which the right may be claimed.

In the present conflict of the authorities it is very difficult to lay down any definite rule as to the extent to which the

(*q*) *Scott* v. *Pape*, 31 Ch. D. 554.

(*r*) *Bullers* v. *Dickinson*, 29 Ch. D. 155.

(*s*) *Scott* v. *Pape*, *suprà*.

(*t*) *Ib.*; see per Bowen, L. J., at p. 574; but this doctrine is at variance with the opinion of Jessel, M. R., in *Nat. Prov. Insurance Co.* v. *Prudential Assurance Co.*, 6 Ch. D. 757, 759.

(*u*) *Harris* v. *De Pinna*, 33 Ch. D. 238, 258.

(*x*) *Scott* v. *Pape*, see per Cotton, L. J., at p. 570; and see *Fowlers* v. *Walker*, 51 L. J. Ch. 413.

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enjoyment of this easement can be claimed; but it seems to be the better opinion that the extent of the right is the same whether the dominant tenement in respect of which it is claimed be situate in a town or in the country (*x*); and that the right extends not only to light sufficient for the use to which the tenement is for the time being applied, but also to light sufficient for any purposes for which it may reasonably be used (*y*).

As to the quantity of light.

It seems to be now well settled that the Act, although it has altered the mode in which the right may be acquired, has not altered or extended the right itself; and that, as before the Act, the owner of the dominant tenement was only entitled to such a quantity of light as was sufficient, according to ordinary usage, for the comfortable and beneficial enjoyment of his house or shop; so, since the Act, he can only acquire by prescription a right to a *sufficient* quantity of light, not necessarily a right to all the light which he has enjoyed during the statutory period (*z*).

On sale of one of two adjoining tenements by the owner of both.

With regard to the difficult question of implied grants and reservations of the right to light on the sale of two adjoining tenements by the common owner, it is conceived that the cases which at first sight seem to be conflicting may be reconciled under the three following propositions:—1. If the owner of a house and adjoining land sell, or contract to sell (*zz*)

(*x*) *Yates* v. *Jack*, 1 Ch. 299; *Dent* v. *Auction Mart Co.*, 2 Eq. 248; *Lyon* v. *Dillimore*, 14 W. R. 511; *Martin* v. *Headon*, 2 Eq. 430; *Mackey* v. *Scottish Widows' Society*, 11 I. R. Eq. 541, 560; and see *contrà*, *Clarke* v. *Clark*, 1 Ch. 16; *Durell* v. *Pritchard*, *ibid.* 251; *Robson* v. *Whittingham*, 35 L. J. Ch. 228; and see observations of L. J. James on *Clarke* v. *Clark* in *Kelk* v. *Pearson*, 6 Ch. 809, see p. 812.

(*y*) *Yates* v. *Jack*, *Dent* v. *Auction Mart Co.*, *suprà*; *Younge* v. *Shaper*, 27 L. T. 643; *Mackey* v. *Scottish Widows' Society*, *suprà*. *Jackson* v. *Duke of Newcastle*, 3 D. J. & S. 275; and *Martin* v. *Goble*, 1 Camp. 320 must be treated as overruled by *Yates* v. *Jack*, *suprà*; see *Aynsley* v. *Glover*, 18 Eq. 544, per Jessel, M. R.; and *Moore* v. *Hall*, 3 Q. B. D. 178.

(*z*) See and consider *Kelk* v. *Pearson*, 6 Ch. 809. The rule, that, if access of light is not interfered with to an extent which will diminish the angle of light below 45°, there is no material interference, is not an absolute rule of law or evidence; *City of London Brewery Co.* v. *Tennant*, 9 Ch. 212; *Theed* v. *Debenham*, 2 Ch. D. 165; *Parker* v. *First Avenue Hotel Co.*, 24 Ch. D. 282.

(*zz*) *Beddington* v. *Atlee*, 35 Ch. D. 317.

the house first, he impliedly grants with it the right to light over the adjoining land, and can neither himself obstruct the lights of the house, nor give to anyone claiming under him the right to do so (*a*). 2. If the common owner sell, or contract to sell (*aa*), the land first, keeping the house meanwhile, there is no implied reservation of the right to light for the house; and the purchaser of the land may obstruct the light previously enjoyed by the house, whether the house remains in the possession of the original vendor, or has been subsequently sold by him (*b*). And the only exception to this rule—that if a vendor wishes to reserve any rights for the property which he retains, he must do so by express words—is the case of apparent and continuous easements (*c*). 3. If the common owner sell the land and house either simultaneously, or, though not simultaneously, yet in such a way that both conveyances are really part and parcel of one sale, and are in fact founded upon transactions which in Equity are equivalent to conveyances between the parties at the time when the transactions were entered into, in such a case there is an implied reservation of the right to light for the house (*d*). And it has been held, in a recent case, where the simultaneous alienation was effected by the will of the common owner,

(*a*) *Palmer* v. *Fletcher*, 1 Lev. 122; *Cox* v. *Matthews*, 1 Vent. 237; *Tenant* v. *Goldwin*, 2 Ld. Raym. 1089, 1093; *Rosewell* v. *Pryor*, 6 Mod. 116; *Robinson* v. *Grave*, 21 W. R. 569.

(*aa*) *Beddington* v. *Atlee*, 35 Ch. D. 317.

(*b*) *Tenant* v. *Goldwin*, *suprà*; *White* v. *Bass*, 7 H. & N. 722; *Suffield* v. *Brown*, 4 D. J. & S. 185; *Carriers' Co.* v. *Corbett*, 2 Dr. & S. 355; *Ellis* v. *Manchester Carriage Co.*, 2 C. P. D. 13; *Wheeldon* v. *Burrows*, 12 Ch. D. 31; *Russell* v. *Watts*, 25 Ch. D. 565; reversed 10 Ap. Ca. 590, but on the ground that in the particular circumstances there was an implied contract not to interfere with the lights of the reserved property which displaced the general rule above stated, and practically brought it within the principle of the 3rd class of division; and the rule applies to the case where a man, while a lessee of adjoining land, lets the house, and afterwards acquires the fee in the land occupied by him under the lease; in that case it has been held that he is in the same position as a stranger would have been, and is entitled to obstruct the lights of his own tenant: *Booth* v. *Alcock*, 8 Ch. 663; and see *Beddington* v. *Atlee*, *suprà*.

(*c*) *Wheeldon* v. *Burrows*, *suprà*, p. 49.

(*d*) *Swansborough* v. *Coventry*, 9 Bing. 305; *Compton* v. *Richards*, 1 Pri. 27; *Allen* v. *Taylor*, 16 Ch. D. 355; and see and distinguish *Watson* v. *Troughton*, 48 L. T. 508.

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that the fact that the dominant tenement was not at the date of the will in the actual possession of the testator, but was let on lease, did not alter the rule; and that the devisee of the servient tenement, and those claiming under him, were not entitled to obstruct the lights of the houses (*e*).

Vendor should keep rights alive.

In every such case a prudent vendor will, by express reservation or re-grant, keep on foot for his own benefit, in respect of the tenement retained, any easement or quasi-easement which he may have acquired or enjoyed, or which he may desire to exercise, over the tenement sold.

As to right to air.

There is no natural right of uninterrupted access of air to the chimneys of a building (*f*), or to a windmill (*g*), nor can such a right be acquired by prescription (*h*), but must be the subject of an express grant.

As to easements other than light.

Claims of right of way, water, watercourse, or any other easement (except light) become *primâ facie* valid after twenty years' uninterrupted enjoyment; and cannot be defeated by mere proof of such enjoyment having commenced at any prior period; but, until forty years' uninterrupted enjoyment, they remain liable to be defeated in any other way in which they might have been defeated before the passing of the Act; *e.g.*, "by proof of a grant, or of a licence, written or parol, for a limited period, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised" (*i*): after forty years' uninterrupted enjoyment, they become absolute and indefeasible, unless proof be given of such enjoyment having been under some consent or agreement expressly given or made for that purpose by deed or writing (*k*): after the end

(*e*) *Barnes* v. *Loach*, 4 Q. B. D. 494; but whether the result would have been the same if the servient, and not the dominant, tenement had been in lease, is at least doubtful: see Goddard, 251.

(*f*) *Bryant* v. *Lefever*, 4 C. P. D. 172.

(*g*) *Webb* v. *Bird*, 13 C. B. N. S. 841.

(*h*) *Potts* v. *Smith*, 38 L. J. Ch. 58; and see *Hall* v. *Lichfield Brewery Co.*, 49 L. J. Ch. 655; *Harris* v. *De Pinna*, 33 Ch. D. 238.

(*i*) Per Parke, B., in *Bright* v. *Walker*, 1 C. M. & R. 219.

(*k*) Sect. 2.

of the twenty years, and before the end of the forty, a grant may still be presumed by a jury (*l*), notwithstanding that the enjoyment is shown to have originated in an agreement by parol or writing not under seal (*m*); but no such presumption is admissible if the owner of the servient tenement was incapable of rightfully granting the easement: *e.g.*, if such grant would have been a breach of trust (*n*).

As to rights of way:

Some of the main points in the law as to rights of way may be here conveniently referred to. A road may be a common highway, even though it is only occasionally used by the public, or is circuitous, or does not terminate in a town, or in some other public road (*o*); and a very short continuous user of it by the public, openly and as of right, is sufficient to raise a presumption of its dedication to their use (*p*): but the presumption may be rebutted by evidence of the owner's intention that the public should only have a permissive user, as, *e.g.*, by his arbitrarily closing the way for one day in each year (*q*), or by showing that the state of the title was such that a binding dedication was impossible (*r*); but mere non-user for any number of years will not destroy (*s*), or prevent the public from resuming (*t*), the right to a public way; though it may be evidence that no such right ever existed. The soil of a road, whether public or private, *usque ad medium filum viæ*, is presumed to belong to the adjoining owners (*u*); and passes by the conveyance,

public way:

(*l*) See 1 C. M. & R. 222.

(*m*) *Dewhurst* v. *Wrigley*, 1 C. P. Coop. 329.

(*n*) *Rochdale C. Co.* v. *Radcliffe*, 18 Q. B. 287.

(*o*) *Rex* v. *Inhabitants of Wandsworth*, 1 B. & Ald. 63.

(*p*) *Rugby Charity* v. *Merryweather*, 11 Ea. 375n.; where a period of six years was held sufficient. See, too, *Powers* v. *Bathurst*, 49 L. J. Ch. 294.

(*q*) *Trustees of British Museum* v. *Finnis*, 5 C. & P. 460.

(*r*) *Reg.* v. *Petrie*, 4 E. & B. 737. The *onus* of displacing the presumption lies on the person seeking to deny the inference from the public user; *Powers* v. *Bathurst*, *suprà*.

(*s*) *Dawes* v. *Hawkins*, 8 C. B. N. S. 848.

(*t*) *Rex* v. *Montague*, 4 B. & C. 598.

(*u*) *Berridge* v. *Ward*, 10 C. B. N. S. 400. The presumption does not extend to a road not actually existing, but only intended to be made; *Leigh* v. *Jack*, 5 Ex. D. 264; *Holmes* v. *Bellingham*, 7 C. B. N. S. 329. But see as to highways under an urban sanitary authority, Public Health Act, 1875, ss. 4, 149; *Coverdale* v. *Charlton*, 4 Q. B. D. 104.

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even where the land is set forth by admeasurement, and is described by reference to a plan which contains no portion of the highway (*x*).

private way;

A right of private way is generally claimed by express grant or reservation; but such a grant has been presumed from an uninterrupted enjoyment of twenty years not shown to be merely permissive (*y*); and the presumption may be raised, even where the land is in the occupation of a tenant, if the user has been of long duration, or there are other circumstances which prove that such user was with the knowledge of the owner of the inheritance (*z*).

way of necessity.

A right of way, by necessity, may be claimed, as arising from an implied grant, on the principle that a convenient way is impliedly granted as a necessary incident to the land conveyed (*a*). Such a right is an exception to the general rule that a grantor, if he intends to reserve any right over the tenement granted, must reserve it expressly in the grant: the ground of the exception being, apparently, the public policy of preventing any tenement from becoming absolutely useless (*b*). Hence, such a right of way is impliedly granted, or reserved, where a land-locked tenement is granted, or retained, while the adjoining land is granted (*c*). But nothing

(*x*) *Barridge* v. *Ward*, 10 C. B. N. S. 400; *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. 133. The soil of the road is not boundary, but part of the property sold, and stands on the same footing as to payment; *Re Popple and Barratt*, 25 W. R. 248.

(*y*) *Campbell* v. *Wilson*, 3 Ea. 294.

(*z*) *Davies* v. *Stephens*, 7 C. & P. 570; *Daniel* v. *North*, 11 Ea. 372. The owner of a wharf or of property skirting a road has, *jure naturæ*, a private right of access to the river or road; *A.-G.* v. *Thames Conservators*, 1 H. & M. 1. Interference with such a private right is ground for an action for damages; *Rose* v. *Groves*, 5 Man. & G. 613; *Luon* v. *Fritz* v. *Hobson*, 14 Ch. D. 542.

(*a*) *Proctor* v. *Hodgson*, 10 Ex. 824, 828; *Pinnington* v. *Galland*, 9 Ex. 1.

(*b*) *Dutton* v. *Tayler*, 2 Lutw. 1487; *Pinnington* v. *Galland*, *suprà*; *Wheeldon* v. *Burrows*, 12 Ch. D. 31, 57.

(*c*) *Clark* v. *Cogge*, Cro. Jac. 170; *Howton* v. *Frearson*, 8 T. R. 50; *Pinnington* v. *Galland*, *suprà*; *Gayford* v. *Moffatt*, 4 Ch. 133; *Cannon* v. *Villars*, 8 Ch. D. 415. It should be observed that the term "*reserved*" is not an accurate expression, because where the land-locked close is retained, while the adjoining land is granted, the implied right of way to the close—strictly speaking—ope-

short of absolute necessity for the user of the way at the date of the grant is sufficient to raise the implication (*d*); and the right is limited by, and ceases with, the necessity which created it (*e*), and is confined to a user for such purposes as were necessary for the enjoyment of the land-locked tenement at the date of its separation from the adjoining land, and does not extend to a user for any other purposes (*f*).

By whom to be determined.

It is for the grantor to determine what is a convenient way to the land-locked land (*g*); but when once the way has been created, it seems the better opinion that the owner of the servient tenement cannot divert it at his pleasure, even though the substituted way may be as convenient (*h*). Where on a devise a farm was severed, and there was no access to one of the severed portions, except over the other, and the will was silent as to any right of way, it was held that there was an implied grant of a right of way which actually existed at the death of the testator, who had himself occupied the farm (*i*).

How right of private way may be lost.

A private right of way is not necessarily lost by twenty years' non-user, the party entitled having had a more convenient mode of access; in order that non-user may have the effect of destroying the right, it must be the consequence of something which is adverse to the user (*k*): and a parol agreement for the substitution of a new way has been held no evidence of the abandonment of an old prescriptive way (*l*). A right of way by prescription must be restricted to the kind of user to which the prescription extends; the true principle being "that you cannot from evidence of user of a privilege,

grantee of the adjoining land; *Corporation of London* v. *Riggs*, 13 Ch. D. 798.

(*d*) *Dodd* v. *Burchell*, 1 H. & C. 113; *Proctor* v. *Hodgson*, 10 Ex. 824.

(*e*) *Holmes* v. *Goring*, 2 Bing. 76.

(*f*) *Corporation of London* v. *Riggs*, *suprà*; see and consider *Serff* v. *Acton Local Bd.*, 31 Ch. D. 679.

(*g*) *Clarke* v. *Rugge*, 2 Roll. Abr. 60, pl. 17; *Packer* v. *Wellstead*, 2 Sid. 111; *Bolton* v. *Bolton*, 11 Ch D. 968.

(*h*) See *dicta* of Blackburn, J., in *Pearson* v. *Spencer*, 1 B. & S. 584.

(*i*) *Pearson* v. *Spencer*, *suprà*.

(*k*) *Ward* v. *Ward*, 7 Ex. 838.

(*l*) *Lovell* v. *Smith*, 3 C. B. N. S. 120, 126, 127.

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connected with the enjoyment of property in its original state, infer a right to use it, into whatsoever form, or for whatever purpose, that property may be changed" (*m*); where it depends upon grant it may be lost by the user of it for purposes not authorized by the terms of the grant (*n*); but unless specially restricted, it will, as a general rule, be construed as a right of way for all purposes (*o*). Thus, where a right of way was granted to A. through a gateway belonging to the vendor "to a wicket gate to be erected by A.," leading into part of the property conveyed to him, and A., instead of building a wicket gate, erected a cart shed, and claimed a right of carriage way to it, it was held that no restriction could be implied from the terms of the grant, and that the purchaser was entitled to a right of way for all purposes (*p*).

As to water and watercourses.

The law as to water and watercourses seems in its principal points to be as follows (*q*):—Every riparian proprietor has a *primâ facie* right to fish the stream in front of his own land (*r*); and to use it for his own purposes in any manner

(*m*) *Wimbledon Commons Conservators* v. *Dixon*, 1 Ch. D. 362, 368, per James, L. J.; see also *Bradburn* v. *Morris*, 3 Ch. D. 812.

(*n*) *Allan* v. *Gomme*, 11 A. & E. 759; and see *Henning* v. *Burnet*, 8 Ex. 192; *Williams* v. *James*, L. R. 2 C. P. 577; *Wood* v. *Saunders*, 10 Ch. 582.

(*o*) *United Land Co.* v. *G. E. R.*, 10 Ch. 586; *Newcomen* v. *Coulson*, 5 Ch. D. 133; *Finch* v. *G. W. R. Co.*, 5 Ex. D. 254. Thus, a right of way may include the right of space for turning; *Knox* v. *Sanson*, 25 W. R. 864.

(*p*) *Watts* v. *Kelson*, 6 Ch. 166; see note, p. 169. See, too, *Somerset* v. *G. W. R. Co.*, 46 L. T. 883, where the meaning of a "right of ingress, egress, and regress," in connection with a right of way, was explained by Fry, J.

(*q*) As to the rights of a riparian owner against a public body taking or diverting the stream under statutory powers, see *Stone* v. *Mayor of Yeovil*, 2 C. P. D. 99; and see and distinguish *Bush* v. *Trowbridge Water Co.*, 10 Ch. 459, which was decided upon the construction of a special Act. The effect of the diversion of an old road and the substitution of a new one, under sect. 16 of the R. C. C. Act, seems to be to vest the old road in the original owner freed from the public right of way; *Marquis of Salisbury* v. *G. N. R. Co.*, 5 C. B. N. S. 174. As to the rights of a riparian owner to the user of a navigable river, see *Original Hartlepool Colliery Co.* v. *Gibb*, 5 Ch. D. 713; *Orr-Ewing* v. *Colquhoun*, 2 Ap. Ca. 839. As to the rights of riparian owners in lakes, see *Bristow* v. *Cormican*, 3 Ap. Ca. 641; *Mackenzie* v. *Banks*, *ibid.* 1324. There is no rule that the *solum* of a lake *ad medium filum aquæ* is vested in the riparian owners; *Bloomfield* v. *Johnston*, 8 I. R. C. L. 68.

(*r*) *Lamb* v. *Newbiggin*, 1 C. & K.

not inconsistent with the exercise of a similar right by the proprietors of land above or below; but he can neither as against those below injure the quality of the water, nor sensibly diminish its quantity, nor as against those above can he dam up the water to their inconvenience (s). A riparian owner cannot, except as against himself, confer on anyone who is not a riparian owner any right to use the water of the stream; and an action will lie by riparian owners lower down against a non-riparian owner who has, under a grant from a riparian owner, done any injury to the stream (t). But in order to obtain either damages or an injunction, some injury must be shown to have been done to the lower riparian owners; and no relief will be given against such a non-riparian owner if, after using the water, he return it undiminished and unpolluted (u). The right to divert and use the stream for the purpose of irrigation is a question of degree, which cannot be precisely defined, but depends upon the application of the above general principles to the particular case (x). Where the right to a certain flow of water has been acquired, it will not, it seems, be lost by the application of the water to a new and more beneficial use (y).

No right to flowing water except where it has a definite channel.

But the right to flowing water *ex jure naturæ* only prevails where it has a defined course; and does not extend to water flowing over, or soaking through, permeable land,

549. As to who is a riparian owner, and as to the power of a riparian owner to grant to a non-riparian owner the use of the watercourse, see *Nuttall* v. *Bracewell*, L. R. 2 Ex. 1.

(s) See *Wright* v. *Howard*, 1 S. & S. 190; *Mason* v. *Hill*, 2 B. & Ad. 1 (commented on in *Orr-Ewing* v. *Colquhoun*, 2 App. Ca. at p. 854); *Acton* v. *Blundell*, 2 M. & W. 349; *Wood* v. *Waud*, 3 Ex. 748; *Embrey* v. *Owen*, 6 Ex. 353; *Rawstron* v. *Taylor*, 11 Ex. 369; *Miner* v. *Gilmour*, 12 Mo. P. C. 186; and see *Swindon Waterworks Co.* v. *Wilts and Berks Canal Co.*, L. R. 7 H. L. 697.

(t) *Stockport Waterworks Co.* v. *Potter*, 3 H. & C. 300; *Ormerod* v. *Todmorden Mill Co.*, 11 Q. B. D. 155.

(u) *Kensit* v. *G. E. R. Co.*, 27 Ch. D. 122. As to the form of relief, see *Pennington* v. *Priuseep Hall Coal Co.*, 5 Ch. D. 769.

(x) See *Wood* v. *Waud*; *Embrey* v. *Owen*, *supra*; *A.-G.* v. *Corp. of Plymouth*, 9 B. 67; *Elmhirst* v. *Spencer*, 2 M. & G. 45; *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590; *Earl of Sandwich* v. *G. N. R. Co.*, 10 Ch. D. 707.

(y) See *Holker* v. *Porritt*, L. R. 10 Ex. 59; and see *Watts* v. *Kelson*, 6 Ch. 166. As to who is a riparian owner, see *Holker* v. *Porritt*.

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before it has found its way into a definite channel (z). If the existence of a subterranean watercourse be a matter of notoriety, the landowner's rights are the same as if it were superficial (a); thus, where there was a natural drainage by means of "swallets," (*i.e.*, funnel-shaped fissures in the rock forming the Mendip Hills,) and the waters running through them found an outlet at the foot of the hills, a mine-owner was restrained from fouling the surface water, to the injury of the owner of an ancient mill who had long enjoyed the water in an unpolluted state (b). But the principles which regulate the rights of owners of land in respect of water flowing in a certain defined course, whether in an open stream, or by a known subterranean channel, are wholly inapplicable to water percolating through underground strata without any definite course (c); thus, it has been held that the owner of an ancient mill could not maintain an action against a landowner, who, by sinking a deep well on his own ground, had intercepted the water which would have otherwise percolated through the soil into a river which supplied the motive power to the mill (d); and the mere fact of such landowner obtaining control over the water so intercepted will not impose on him the obligation to prevent it from flowing into the adjoining land as it did before it was intercepted (e); but where water from a spring flows in a natural channel, the landowner cannot cut off the spring at its source, to the injury of a riparian proprietor lower down the stream (f); and he may not use his right to water percolat-

(z) *Pryce* v. *Rees*, [illegible], 14 Ex. 602, and see *Rees* v. *Lloyd*, [illegible], *ibid.* 309, 682.

(a) *Dickinson* v. *Grand Junction Canal Co.*, 7 Ex. 299, 301, but see *Chasemore* v. *Richards*, 7 H. L. C. 349; *Grand Junction Canal Co.* v. *Shugar*, 6 Ch. 483.

(b) *Robinson* v. *Fowler*, 4 B. & S. 229. Underground water, not flowing in defined channels, may be expressly granted. *Wheelhouse* v. *Parks*, 2 H. & N. 870, but see and distinguish *Ewart* v. *Belfast Guardians*, 9 I. R. Ir. 172. As to the meaning of "known and defined" channel in this connection, see *Black* v. *Ballymena Commissioners*, 17 L. R. Ir. 159.

(c) *Chasemore* v. *Richards*, 7 H. L. C. 349, and see *Acton* v. *Blundell*, 12 M. & W. 324.

(d) *Chasemore* v. *Richards*, *suprà*, questioning *Dickinson* v. *Grand Junction Canal Co.*, 7 Ex. 300.

(e) *West Cumberland Co.* v. *Kenyon*, 11 Ch. D. 782.

(f) *Dodden* v. *Guardians of Clutton Union*, 1 H. & N. 627.

ing through underground strata, so as to draw off the water flowing in a defined channel on his neighbour's land (*g*); but although the owner of land has no right to restrain the interception of water which percolates into his land, he is entitled upon general principle to restrain the adjoining owner from polluting it (*h*).

Prescriptive right to foul a stream.

A right to use a natural stream for the purpose of washing ore, and carrying off the sand, stone, and rubble dislodged in the necessary working of a mine, may be acquired by custom or prescription (*i*); but where a prescriptive right to foul a stream has been acquired, the fouling must not be increased to the prejudice of the other riparian proprietors (*k*); nor so as to increase the pollution by a novel mode of user (*l*). The mere suspension of the exercise of the prescriptive right is not sufficient to destroy it, unless there is some evidence of an intention to abandon it; but where dye-works had been disused for more than twenty years, the right of fouling the stream which attached thereto was held to be lost (*m*).

Distinction between natural and artificial watercourses as respects the rights which may be acquired.

The same rules, which regulate the rights of user of a natural stream, apply also, in general, to an artificial watercourse, but with this modification, *viz.*, that in determining what rights can be acquired in respect of an artificial watercourse, the special or temporary purpose for which it was originally constructed, and has since been used, must not be overlooked (*n*). Thus, a user for twenty years of the flow of

(*g*) *Grand Junction Canal Co.* v. *Shugar*, 6 Ch. 483.

(*h*) *Ballard* v. *Tomlinson*, 29 Ch. D. 115.

(*i*) *Carlyon* v. *Lovering*, 1 H. & N. 784.

(*k*) *Crossley* v. *Lightowler*, 2 Ch. 478.

(*l*) *Baxendale* v. *McMurray*, 2 Ch. 790.

(*m*) *Crossley* v. *Lightowler*, *suprà*, and see also as to suspension of the easement, *Ladyman* v. *Grave*, 6 Ch. 763; and as to long-continued interruption from natural causes, see *Hall* v. *Swift*, 4 Bing. N. C. 381; and as to the right to pollute streams or rivers, see *Goldsmid* v. *Tunbridge Wells Commoners*, 1 Ch. 349; *A.-G.* v. *Corporation of Leeds*, 5 Ch. 583.

(*n*) *Magor* v. *Chadwick*, 11 A. & E. 571; *Sutcliffe* v. *Booth*, 9 Jur. N. S. 1037; *Nuttall* v. *Bracewell*, L. R. 2 Ex. 1; *Beeston* v. *Weate*, 5 E & B. 986; *Roberts* v. *Richards*, 50 L. J. Ch. 297, and see *Rameshur Singh* v. *Koonj Pattuk*, 4 Ap. Ca. 121, where it was held that under the circumstances a

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water from the agricultural drainage of adjoining land gives no right to its continuance (o); so, no prescriptive right by user can be acquired to the overflow of water from a lock, so as to prevent a canal company from improving the construction of the lock (p); so, a person receiving water discharged from a mine cannot insist on a continuance of such discharge (q); so, the flow of water for twenty years from the eaves of a house into a neighbour's yard, does not prevent the owner of the house from pulling it down, or altering it so as to discontinue or lessen the supply of water from the roof (r).

As to canals.

The waters of a canal, having been devoted by the Legislature to that special purpose, are, as respects the power of adjoining owners to acquire a right over them, on a different footing from waters flowing in their natural stream, or in an ordinary artificial watercourse; and the general rule that the purpose for which artificial waters have been collected must be regarded in determining whether any prescriptive rights have been acquired over them, applies with especial force to the waters of canals (s).

As to right to pump water from a mine and use it.

A right to pump water from a mine, and to use it, and then let it off over adjoining land, has been held to be a right of "watercourse" within the Act (t); so, a right to discharge rain-water from the roof of a house upon adjoining land may be acquired by twenty years' user (u). We may here remark that a reservation of "water and soil" has been held to mean only water in its natural condition, and such matters as are

legal right was to be presumed to the overflow of water flowing through an artificial channel from a reservoir.

(o) *Gratrix* v. *Hopwood*, 8 Ex. 261; *Wood* v. *Waud*, 3 Ex. 748.

(p) *Staffordshire Canal Co.* v. *Birmingham Canal Co.*, L. R. 1 H. L. 254.

(q) *Arkwright* v. *Gell*, 5 M. & W. 203.

(r) *Wood* v. *Waud*, 3 Ex. 748; *Arkwright* v. *Gell*, *supra*.

(s) *Staffordshire Canal Co.* v. *Birmingham Canal Co.*, L. R. 1 H. L. 254; and see and consider *Mason* v. *Shrewsbury and Hereford R. Co.*, L. R. 6 Q. B. 578.

(t) *Wright* v. *Williams*, 1 M. & W. 77.

(u) *Thomas* v. *Thomas*, 2 C. M. & R. 34.

the result of the ordinary use of land for purposes of habitation, and not to include refuse from a manufactory (*x*).

As to ownership of soil of watercourse.

The bed of all tidal navigable rivers, and of all arms of the sea, presumably belongs to the Crown; but primarily for the benefit of the subjects: and the public right of navigation is paramount to the private right even of an express grantee of the soil (*y*). As between the Crown, or the Crown's grantee and a seaside landowner, the right of the former is presumably limited by the line of medium high-tide, between the springs and the neaps (*z*). Where a river is not navigable, *i. e.*, not tidal (*a*), the presumption is that each riparian proprietor is entitled, subject, of course, so far as the river is navigable to the public right of navigation (*b*), to the soil *usque ad medium aquæ* (*c*); being similar to the presumption which exists in regard to roads (*d*). And it seems to be now settled that a riparian owner on a navigable river may exercise all rights of ownership on the bed of the river (*e. g.*, by building thereon), so long as he does not interfere with the right of navigation in the public, or the rights of other riparian owners (*e*); and the rule is the same in the case of a tidal as of a non-tidal stream (*f*).

As to the right of lateral support.

Every landowner, independently of prescription, and as an original right incident to property, is entitled to so much

(*x*) *Chadwick* v. *Marsden*, L. R. 2 Ex. 285.

(*y*) *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C. 192; see, too, *Malcolmson* v. *O'Dea*, 10 H. L. C. 593.

(*z*) *A.-G.* v. *Chambers*, 4 D. M. & G. 206. As to the title to lands gained from the sea, either by alluvion or dereliction, and either by natural or artificial causes, see *A.-G.* v. *Chambers*, 4 D. & J. 55. As to the right of the owner of the foreshore to remove shingle, see *A.-G.* v. *Tomline*, 14 Ch. D. 58. As to the title to foreshore in Cornwall, see *Mayor of Penryn* v. *Holm*, 2 Ex. D. 328.

(*a*) *Murphy* v. *Ryan*, 2 I. R. C. L. 143, 152.

(*b*) *A.-G.* v. *Terry*, 9 Ch. D. 423.

(*c*) *Wishart* v. *Wyllie*, 1 Macq. 389. There is no such presumption in respect of large inland lakes: *Bristow* v. *Cormican*, 3 Ap. Ca. 641; *Bloomfield* v. *Johnson*, 8 I. R. C. L. 68.

(*d*) *Reg.* v. *Pratt*, 3 C. L. R. 686; see *ante*, p. 411.

(*e*) *Orr-Ewing* v. *Colquhoun*, 2 Ap. Ca. 839; and see *Bickett* v. *Morris*, L. R 1 Sc. & D. 47, as to the rights of the opposite riparian owner.

(*f*) *A.-G.* v. *Earl of Lonsdale*, 7 Eq. 377.

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lateral support from his neighbour's land as is necessary to keep his soil in its natural state (*g*); but he has no *primâ facie* right to overburden his own land by buildings, and then to require an extraordinary amount of support by his neighbour's land (*h*). If, however, his buildings, although of recent erection, do not contribute to the subsidence—that is to say, if the facts show that the subsidence would have occurred even if the buildings had not been erected,—he is entitled to full damages in case of their being destroyed or injured by subsidence caused by subterranean workings under the adjoining land (*i*). Whether or not the right to extraordinary support is an easement coming within the provisions of the Act, is a question which was left open by the recent decision of the House of Lords in *Angus* v. *Dalton* (*j*). Such a right may, according to that case, be acquired by twenty years' uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the pressure at the beginning of that time, provided that the enjoyment is peaceable, and without deception or concealment, and so open that it must be known that some support is being enjoyed by the building. But the grant of such an easement may be implied; for a vendor on selling part of his land is presumed to grant such a measure of support from his adjacent land as is necessary for the land sold in its then condition, or when applied to the purpose for which the grant was expressly made; but the precise measure of such support depends upon the special circumstances of each case (*k*). So, where houses are built on land belonging

How the right may be acquired.

(*g*) *Hunt* v. *Peake*, Johns. 705; *Roughotham* v. *Wilson*, 8 E. & B. 123. This right is confined to such an extent of adjacent land as in its natural and undisturbed state is sufficient to afford the requisite support: *Corp. of Birmingham* v. *Allen*, 6 Ch. D. 284.

(*h*) *Harris* v. *Ryding*, 5 M. & W. 60; *Humphries* v. *Brogden*, 12 Q. B. 739; *Jeffries* v. *Williams*, 5 Ex. 792; *Smart* v. *Morton*, 5 E. & B. 30.

(*i*) *Brown* v. *Robins*, 4 H. & N. 186; *Stroyan* v. *Knowles*, 6 H. & N. 454.

(*j*) 6 App. Ca. 740. The recent case of *Lemaître* v. *Davis*, 19 Ch. D. 291, is an authority for answering the question in the affirmative.

(*k*) *Cal. R. Co.* v. *Sprot*, 2 Macq. 449; *Roughotham* v. *Wilson*, 8 H. L. C. 348; *Roberts* v. *Haines*, 6 E. & B. 643; *Haines* v. *Roberts*, 7 E. & B. 625; *Cal. R. Co.* v. *Ld. Belhaven*, 3

to the same owner, and are then sold to different purchasers, or some are sold and others retained by the landowner, the right to mutual support will be presumed, by way of reservation or grant in the several conveyances (*k*); but where two adjoining plots or houses belonging to the same owner are sold at different times, the measure of support to which the second purchaser is entitled depends on the terms of the contract entered into with the first (*l*).

When right of action accrues for withdrawal of support.

When the right of support is interfered with by the withdrawal from the adjoining land of the necessary supporting strata, no right of action accrues until some actual damage has resulted from the withdrawal of the support (*m*); and the damage must be appreciable (*n*): but if the party withdrawing the support insists that he has a right to do so, without being liable for any damage resulting therefrom, he may, it seems, be restrained by injunction, although no actual mischief has occurred (*o*). It follows from the doctrine laid down in *Bonomi* v. *Backhouse* that each fresh subsidence is itself a new cause of action. Thus, where there was a subsidence in 1868 for which compensation was made, and no further working took place, but in 1882 a fresh subsidence occurred owing to workings by an adjacent mineowner, it was held that the Statute of Limitations was no bar to an action for the injury done by the fresh subsidence, although it occurred so many years after the workings had ceased (*p*).

Right of surface owner to support where

A reservation or grant of minerals, with power to work them, does not, in the absence of express stipulation, deprive

Macq. 56; *Backhouse* v. *Bonomi*, 9 H. L. C. 503; *Smith* v. *Darby*, L. R. 7 Q. B. 716; *Siddons* v. *Short*, 2 C. P. D. 572; *Rigby* v. *Bennett*, 21 Ch. D. 559.

(*k*) *Richards* v. *Rose*, 9 Ex. 218; *Nicholls* v. *Gaufford*, *ib.* 702.

(*l*) *Murcha* v. *Black*, 19 C. B. N. S. 190.

(*m*) *Backhouse* v. *Bonomi*, *suprà*, overruling *Nuttall* v. *Williams*, 10 Ex. 259; see, too, *Elliott* v. *N. E. R. Co.*, 10 H. L. C. 333.

(*n*) *Smith* v. *Thackerah*, L. R. 1 C. P. 564.

(*o*) *N. E. R. Co.* v. *Elliott*; *Siddons* v. *Short*, and *Rigby* v. *Bennett*, *ubi supra*.

(*p*) *Darley Main Colliery Co.* v. *Mitchell*, 11 Ap. Ca. 127; overruling *Lamb* v. *Walker*, 3 Q. B. D. 389.

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minerals and the right to work them are reserved.

the surface owner of his natural right to the support of the subjacent strata; the presumption being that he retains the right to enjoy the surface *modo et formâ* as it was before (*q*), even though it may be impossible to work the mines without causing a subsidence or an absolute destruction of the surface (*r*): and the right of support which a surface owner is presumed to retain for himself on a sale of minerals, belongs equally to an allottee under an inclosure, where the minerals and the right to work them are reserved to the lord of the manor (*s*): and it is now well settled that the ordinary presumption is not rebutted by the mere fact that the Inclosure Act or deed of grant contains "words, however large, applicable to the right of working, and privileges connected with it, and compensation to be paid for working, and for the use of those privileges, which may receive full effect consistently with the right of support" (*t*). And where A., by draining his land, causes a subsidence of the land of B., an adjoining owner, he is not liable for the injury thus occasioned; the Common Law doctrine as to the right to support not extending to subterranean water (*u*).

Minerals are reserved by implication on sales by ecclesiastical corporations for redeeming land tax.

We may here remark that the Land Tax Redemption Acts, in authorizing sales of lands belonging to ecclesiastical corporations, for the purpose of redeeming the Land Tax charged on their other lands, provide for an implied reservation of the minerals. It is believed that the point is not unfrequently overlooked in practice.

(*q*) *Dugdale* v. *Robinson*, 3 K. & J. 695; *Rogers* v. *Taylor*, 2 H. & N. 828; *Harris* v. *Rydings*, 5 M. & W. 69, and *Smart* v. *Morton*, 5 E. & B. 30; and see *Rathbatham* v. *Wilson*, 8 H. L. C. 348, where there was an express stipulation; *Smith* v. *Darby*, L. R. 7 Q. B. 716; *Davis* v. *Treharne*, 6 Ap. Ca. 460; *Dixon* v. *White*, 8 Ap. Ca. 833; *Bell* v. *Love*, 9 Ap. Ca. 286.

(*r*) *Wakefield* v. *Duke of Buccleuch*, 4 Eq. 613; and cases there cited; *S. C.*, L. R. 4 H. L. 377; *Hext* v. *Gill*, 7 Ch. 699; case of china clay which could not be worked without destroying the surface.

(*s*) *Roberts* v. *Haines*, 6 E. & B. 643; *Wakefield* v. *Duke of Buccleuch*, *ubi supra*.

(*t*) *Love* v. *Bell*, 9 Ap. Ca. 286, 289; *Gill* v. *Dickinson*, 5 Q. B. D. 159; and cf. *Benfieldside Local Bd.* v. *Consett Iron Co.*, 3 Ex. D. 54; see, too, *Davis* v. *Treharne*, 6 Ap. Ca. 469; and *Dixon* v. *White*, 8 Ap. Ca. 833.

(*u*) *Popplewell* v. *Hodkinson*, L. R. 4 Ex. 248; and see *Wilson* v. *Waddell*, 2 Ap. Ca. 95.

A reserve stratum may be used for all purposes.

The absolute owner of a mineral stratum, whether under a grant or a reservation, is entitled to use it for any purpose he thinks fit, not inconsistent with the rights of the owner of the surface, *e.g.*, as a means of access to adjoining mineral property (*x*). The effect of a reservation of mines is that the space of sub-soil containing the minerals, as well as the minerals therein, remains the property of the grantor, whether the minerals have been worked out or not (*y*). But this is not so in the case of copyholds, where, although the minerals are the lord's, yet the space, formerly occupied by them, after they have been worked out, belongs to the copyholder, who can maintain trespass against anyone using the vacant space (*z*); unless the mine, as well as the minerals, is by Act of Parliament expressly reserved to the lord (*a*).

A railway company not entitled to minerals except by express purchase.

By the 77th section of the Railways Clauses Consolidation Act, a railway company is not to be entitled to any mines of coal, ironstone, slate, or other minerals, under any lands purchased by it, except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the works, unless the same shall have been expressly purchased: but it may always secure sufficient support by the purchase of the subjacent minerals (*b*); and may delay such purchase until the necessity for it arises (*c*). If, however, the company decline to purchase, the mine-

(*x*) *Proud* v. *Bates*, 34 L. J. Ch. 406; *Duke of Hamilton* v. *Graham*, L. R. 2 Sc. & D. 166; more fully reported in 7 Ct. Sess. Ca. 3rd ser. 976; and see also *Duke of Hamilton* v. *Dunlop*, 10 Ap. Ca. 813.

(*y*) *Ramsay* v. *Blair*, 1 Ap. Ca. 701; and as to the distinction between a right to the coal under a close, as a right to land, and a right to take coal in another's land (which is a profit *à prendre*), see *Wilkinson* v. *Proud*, 11 M. & W. 33.

(*z*) *Eardley* v. *Granville*, 3 Ch. D. 826; and see *Bowser* v. *Maclean*, 2 D F. & J. 420.

(*a*) *Ballacorkish Silver Mining Co.* v. *Harrison*, L. R. 5 P. C. 49.

(*b*) Sect. 78; and as to the compensation payable, see *Smith* v. *G. W. R. Co.*, 3 Ap. Ca. 165. As to what is included under the term "minerals," see *ante*, p. 130.

(*c*) Sect. 6 of the L. C. C. Act empowers the railway company to purchase the minerals under the lands compulsorily, even though they have already got the lands, and this power is not abridged by the 77th section of the R. C. C. Act; *Errington* v. *Met. Dist. R. Co.*, 19 Ch. D. 599; and see *Dixon* v. *Cal. R. Co.*, 5 Ap. Ca. 820.

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owner may work the minerals in a proper manner according to the custom of the district (*d*); and the company cannot, under its statutory purchase, claim the benefit which an ordinary purchaser would have had to the subjacent and adjacent support (*e*). So, a statutory power to construct a sewer does not imply the ordinary right to the necessary lateral support; in such a case, the easement must be acquired by purchase (*f*). But the Public Health Act, 1875, imposes on landowners, through whose land a sewer is made under that Act, an obligation to preserve to such sewer subjacent support, and gives them a right to immediate compensation for being deprived of free power to work subjacent mines, but not for the risk of percolation of sewage into the subjacent mines (*g*).

Claims of rights of common and profits *à prendre*.

Claims of rights of common and other profits *à prendre*, become *prima facie* valid after thirty years' uninterrupted enjoyment (*h*); and cannot be defeated by mere proof of such enjoyment having commenced at any prior period; but until sixty years' uninterrupted enjoyment, they remain liable to be defeated in any other way in which they might have been defeated before the passing of the Act. After sixty years' uninterrupted enjoyment, they become absolute and indefeasible, unless proof be given of such enjoyment having been under some consent or agreement expressly made or given

(*d*) See sect. 79.

(*e*) *G. W. R.* v. *Bennett*, L. R. 2 H. L. 27, *G. W. R. Co.* v. *Fletcher*, 5 H. & N. 689; and see *Cal. R. Co.* v. *Spiers*, 2 Macq. 119, a case before the Railways C. C. Act; *Dudley Canal Co.* v. *Grazebrook*, 1 B. & Ad. 59; and see *Pendarves* v. *Chanter*, 11 Q. B. D. 820, a case of purchase of superfluous lands where the company had not bought the minerals under them. As to communications between mines lying on either side of the line and compensation to the owner of such mines, see sects. 80 and 81, and *M. R. Co.* v. *Miles*, 30 Ch. D. 631.

(*f*) *Metr. Board of Works* v. *Metr. R. Co.*, L. R. 4 C. P. 192; and see 18 & 19 V. c. 120, ss. 135, 150, 151; and 11 & 12 V. c. 112, ss. 38, 66.

(*g*) *Re Corporation of Dudley*, 8 Q. B. D. 86; and under the Gasworks Clauses Act, 1847, *Normanton Gas Co.* v. *Pope*, 52 L. J. Q. B. 629, 636, per Fry, L. J.

(*h*) See *Bailey* v. *Appleyard*, 8 A. & E. 161. The title acquired by user can be merely co-extensive with the user, *Davies* v. *Williams*, 16 Q. B. 546.

for that purpose by deed or writing (*i*). But a claim to a right of common, &c., may be defeated after thirty years' enjoyment by showing that it could not have had a legal origin (*k*); and it would seem that the Act does not apply to any case where the establishment of a right by means of it would be a violation of the express terms of statutes prohibiting the granting of such a right (*l*): nor where the claim is one which cannot be lawfully made by custom, prescription, or presumed grant (*m*).

Claim of right of fishing, &c.

A right to hawk or fish, implies a right to carry away the game or fish; and is therefore a right of profit *à prendre* (*n*); and even a right to angle for amusement, leaving the fish on the shore for the landowner, has been held to be of the same nature (*o*); so, also a right to shoot (*p*). But the mere right to hunt, that is, to follow in the pursuit of game over land, does not of itself import the right to the animal when taken; and, if confined to the individual claimant, would seem to be attributable to a mere personal licence of pleasure: but where the right is exercisable by the claimant or his assigns "along with servants," it is considered to involve a right to carry off the game (*q*), and is an interest in land within the meaning of the Statute of Frauds (*r*).

(*i*) Sect. 1. *Welcome* v. *Upton*, 5 M. & W. 398. The Prescription Act (see s. 1) relates only to claims which may be lawfully made at common law; *Morley* v. *Clifford*, 20 Ch. D. 753; and see *Earl de la Warr* v. *Miles*, 17 Ch. D. 535.

(*k*) *Mill* v. *New Forest Commissioner*, 18 C. B. 60; or that there has been a release of part of the land over which it extends; *Johnson* v. *Barnes*, L. R. 8 C. P. 527.

(*l*) *Mill* v. *New Forest Commr.*, *supra*.

(*m*) *Clayton* v. *Corby*, 5 Q. B. 415; *A.-G.* v. *Mathias*, 4 K. & J. 579.

(*n*) *Wickham* v. *Hawker*, 7 M. & W. 63; *Ewart* v. *Graham*, 7 H. L. C. 331; and therefore a custom to enjoy such a right must be reasonably limited; *Allgood* v. *Gibson*, 34 L. T. 883. As to the limitations of a claim to a profit *à prendre*, see *Commrs. of Sewers* v. *Glasse*, 7 Ch. 456, 465; *Edgar* v. *Special Commrs.*, 23 L. T. 732. So, too, the right of fishing cannot be the subject of reservation: *Doe* d. *Douglas* v. *Lock*, 2 A. & E. 705; and see *Corcor* v. *Payne*, 4 I. R. C. L. 380; but see *Hamilton* v. *Musgrove*, 6 I. R. C. L. 129, a case in the Landed Estates Court.

(*o*) *Bland* v. *Lipscombe*, 3 C. L. R. 261.

(*p*) *Webber* v. *Scott*, 9 Q. B. D. 315.

(*q*) See *Wickham* v. *Hawker*, and *Ewart* v. *Graham*, *supra*.

(*r*) *Webber* v. *Scott*, *supra*.

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Fisheries in tidal waters.

The right of fishing in tidal waters is *primâ facie* vested in all the subjects of the Crown (*s*), and seems to be so vested in them, not as of common right, but by virtue of the ownership by the Crown of the bed of all tidal waters (*t*). Prior to Magna Charta (*u*), however, the Crown had power to grant a several and exclusive right of fishing in such waters to individuals, and thereby to destroy the public right of fishing therein.

This power was abolished by Magna Charta (*u*), and a claim to such a several fishery by an individual can now only be made on the strength of a grant from the Crown prior to the reign of Henry II., or by prescription (*x*). This public right of fishing extends only so far as the tide flows and reflows (*y*): nor does the fact of a river being navigable give the public any right of fishing above the flow of the tide (*z*); nor can the right be acquired by the public by immemorial usage (*a*): the reason being that above that point the bed no longer belongs to the Crown, but is vested in the riparian owners.

Fishery in non-tidal waters.

The right of fishing in non-tidal waters may exist in any of the following forms:—

Several fishery.

(1) A *several fishery* is a right to fish in a particular place to the exclusion of others (*b*), and is *primâ facie* vested in the owner of the alveus (*c*). But it may be

(*s*) Hale, De jure maris, c. 4, *Malcolmson* v. *O'Dea*, 10 H. L. C. 593; *Bristow* v. *Cormican*, 3 Ap. Ca. 641.

(*t*) *Mayor of Carlisle* v. *Graham*, L. R. 4 Ex. 361.

(*u*) 9 Hen. III. c. 16.

(*v*) Hale, c. 5, Co. 2 Inst. 30; *Malcolmson* v. *O'Dea*, 10 H. L. C. 618; *Holford* v. *George*, L. R. 3 Q. B. 639; *Edgar* v. *Commrs. of Fisheries*, 23 L. T. 752; *Neill* v. *Duke of Devonshire*, 8 Ap. Ca. 135. If a several right of fishery which existed before Magna Charta revert to the Crown, it may even now be granted by the Crown; *ibid.* at p. 180; *Duke of Northumberland* v. *Houghton*, L. R. 5 Ex. 127.

(*x*) *Hudson* v. *McCrea*, 4 B. & S. 785.

(*y*) *Hargreaves* v. *Diddams*, L. R. 10 Q. B. 585; *Mussett* v. *Burch*, 35 L. T. 486; *Pearce* v. *Scotcher*, 9 Q. B. D. 162.

(*a*) *Murphy* v. *Ryan*, 2 I. R. C. L. 143.

(*b*) Co. Litt. 122 a, Harg. note 181; *Malcolmson* v. *O'Dea*, 10 H. L. C. at p. 619.

(*c*) *Wishart* v. *Wylie*, 1 Macq. 389.

acquired by a stranger either by grant, or prescription, to the exclusion of the owner of the soil (*d*).

Free fishery.

(2) A *free fishery* is a right to fish in a particular place, but not to the exclusion of others (*e*), and may be claimed either in gross, or as appurtenant to land (*f*).

Common of fishery.

(3) *Common of fishery* differs little, if at all, from a free fishery (*g*). It consists of a right to fish in the water of another, in common with the owner of the soil and it may be with others (*h*). Like other common rights, it may be either appurtenant or in gross (*i*), and is in each case subject to the incidents of the class to which it belongs. Thus a common of fishery appurtenant may be claimed by grant or prescription as appurtenant to a tenement (*k*). But it may be separated from the tenement to which it was originally appurtenant (*l*), and then becomes a common of fishery in gross. Such a right of fishery has no relation to land, and must be claimed by grant or prescription (*m*).

Grants of fisheries; their operation.

Whether a grant of a several fishery by the owner of the soil will have the effect of passing the soil also, is still unsettled; but on the whole, the better opinion would seem to

(*d*) Co Litt. 122 a, Harg. note 181. Shep. T. 97; *Holford* v. *Bailey*, 13 Q. B. 426. Where a several fishery is claimed by a stranger, it must, it seems, be claimed either in gross or as appurtenant to a manor, and not as appurtenant to land merely; *Rogers* v. *Allen*, 1 Camp. 312; *Edgar* v. *Commrs. of Fisheries*, 23 L. T. 737, per Willes, J. If claimed in gross, it is not within the Prescription Act; *Shuttleworth* v. *Le Fleming*, 19 C. B. N. S. 687.

(*e*) Co. Litt. *suprà*; *Malcolmson* v. *O'Dea*, 10 H. L. C. 593, 619.

(*f*) *Edgar* v. *Commrs. of Fisheries*, 23 L. T. 732, 737; *Rogers* v. *Allen*, 1 Camp. 312; *Hayes* v. *Bridges*, R. L. & S. 390.

(*g*) Co. Litt. 122 a, Harg. note 181; Woolrych on Waters, 123.

(*h*) *Benett* v. *Costar*, 8 Taun. 187.

(*i*) It has been sometimes said to be appendant also. But in strictness it is very doubtful whether any common can be appendant, except that of pasture, which is created by legal implication and is of common right for the benefit of agriculture; *Bennett* v. *Reeve*, Willes, 231; Elton on Commons, 14.

(*k*) *Sacheverell* v. *Porter*, Sir W. Jones, 396; Cro. Car. 482; *Coulam* v. *Slack*, 15 Ea. 108; *Edgar* v. *Commrs. of Fisheries*, 23 L. T. 737.

(*l*) *Tenel* v. *Harslop*, 3 Keb. 66; *Hayes* v. *Bridges*, R. L. & S. 390.

(*m*) Co. Litt. 122 a.

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be that there is no presumption to that effect (*n*). At any rate, such a grant will not be deemed to exclude the grantor himself from the right to fish (*o*). By a grant of a *free fishery* no right in the soil will pass to the grantee; nor will the grantor be excluded from the right to fish (*p*). The grant of a "fishery," *eo nomine*, will apparently pass the largest right the grantor has to give (*q*). So, too, a reservation of right and privilege of fishing, where the grantor is at the date of the grant possessed of a sole fishery, will reserve to the grantor an exclusive right of fishery (*r*).

Fishery in inland Lakes.

In small inland lakes and pools of which the soil is vested in one common owner, the right of fishery is also his exclusively. But with regard to large inland lakes, which are navigable, but not tidal, and which are not wholly situated in any one manor, it seems very doubtful how far the rule of ownership *ad medium filum aquæ* applies (*s*). But it is at any rate settled that the Crown has no right to the soil of such lakes; and that there can therefore be no public right of fishing therein (*t*).

Right to dig coal, &c.

A right to dig coal or other minerals on another man's land is a right to a profit *à prendre*, and, if reasonable and certain, may be claimed by prescription (*u*); though not by custom (*v*): but a claim to dig and carry away the soil from

(*n*) Co. Litt. 4b, 122a, Harg. note 181; Shep. T. 97, though Preston is of an opposite opinion; see his note, *ibid.*; *Marshall* v. *Ulleswater Co.*, 3 B. & S. 732, per Cockburn, C. J.; *Bloomfield* v. *Johnston*, 8 I. R. C. L. 68. But see *contra*, *Marshall* v. *Ulleswater Co.*, *supra*, per Wightman and Mellor, JJ. There was undoubtedly such a presumption in pleadings; but whether it ever amounted to more than a rule of pleading is at least very questionable.

(*o*) *Bloomfield* v. *Johnston*, *supra*.

(*p*) *Ibid.*

(*q*) *Alderman of London* v. *Hastings*, 2 Sid. 8.

(*r*) *Lord Poont* v. *Mills*, 3 Doug. 13.

(*s*) *Bloomfield* v. *Johnston*, 8 I. R. C. L. 68; *Bristow* v. *Cormican*, 3 App. Ca. 641; and see *Reg.* v. *Burrow*, 34 J. P. 53.

(*t*) *Bloomfield* v. *Johnston*, *supra*; *Bristow* v. *Cormican*, *supra*.

(*u*) *Paddock* v. *Forrester*, 3 Man. & G. 903; *Wilkinson* v. *Proud*, 11 M. & W. 33.

(*v*) *A.-G.* v. *Mathias*, 4 K. & J. 579, 591; but see *Rogers* v. *Brenton*, 10 Q. B. 26.

another's land, without stint or limit, cannot be established by prescription (*y*).

Right of sole pasturage.

Whether the right to the *sole and several* herbage and pasturage of land is within the Act seems doubtful (*z*); but the right to take, *along with others*, any of the produce of land, *e.g.*, grass, turves, or trees—or of the soil itself, *e.g.*, sand, clay or stones—is a right of profit *à prendre*, which within reasonable limits may be claimed by prescription. The right to enter and draw water from a natural spring is, however, an easement, and not a profit *à prendre;* running water being no part of the soil, nor the produce of the soil (*a*). There is no common law right in the public to enter on the seashore for the purpose of gathering sea-weed (*b*); and it has been held that, although sea-weed lying ungathered on the shore is not the subject of larceny (*c*), yet an action for trover by the owner of the foreshore will lie for it (*d*).

Period for which possession must be proved in evidence of title.

From what has been previously said, it would appear that the period for which a vendor, in order to show a title under the Act, must prove uninterrupted enjoyment, is as follows: *viz.*, twenty years in the case of lights; forty years in the case of ways, waters, watercourses, and other easements (except lights); and sixty years in the case of rights of common and other profits *à prendre;* but, in the second class of cases, where the land or water which is sought to be affected by the easement has, during the period of enjoyment, been held for life, or for any term exceeding three years, the reversioner (*e*), notwithstanding the expiration of the forty years,

(*y*) *Clayton* v. *Corby*, 5 Q. B. 415; *A.-G.* v. *Mathias*, 4 K. & J. 579. As to stone being a "mineral," see *Darvill* v. *Roper*, 3 Dr. 294; and *Bell* v. *Wilson*, 1 Ch. 303; 2 Dr. & S. 395; and cases cited in judgments. See, too, *Hext* v. *Gill*, 7 Ch. 699, as to what is included in the term "minerals;" and *ante*, p. 130.

(*z*) See *Welcome* v. *Upton*, 5 M. & W. 398, 403; but see 6 M. & W. 536, 542.

(*a*) *Race* v. *Ward*, 4 E. & B. 702.

(*b*) *Howe* v. *Stawell*, Ale. & Nap. 348; *Baird* v. *Fortune*, 4 Macq. 127; *Healey* v. *Thorne*, 4 I. R. C. L. 495.

(*c*) *Reg.* v. *Clinton*, 4 I. R. C. L. 6.

(*d*) *Brew* v. *Haren*, 11 I. R. C. L. 198.

(*e*) *I. e.* any person entitled to any reversion expectant on the determi-

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has a period of three years from the determination of the particular estate in which to resist the claim (*f*); so that unless (as can seldom be the case) the vendor can show the title to the land or water, he cannot, by evidence of enjoyment, make a good title to the easement (*g*): and enjoyment which gives no title as against the reversioner, gives no title as against the owner of the particular estate (*h*): and it must be observed that, as regards the *primâ facie* title which is gained by a thirty or twenty years' possession under the first and second sections of the Act, the time during which there may have been any disability, or a subsisting life estate, is altogether excluded by the seventh section. But as respects the easement of light, the Statute contains no reservation of the rights of the reversioner (*i*).

Enjoyment must have been uninterrupted and as of right.

In all the above cases (except that of a claim to light), the enjoyment must have been uninterrupted (*k*), "as of right" (*l*); and must have been subsisting within, at most, a year before the commencement of the action in which it is relied on (*m*): the claim therefore may be defeated by showing that for the whole or a part of the period relied on the enjoyment was by parol licence, or was exercised by stealth, or without the knowledge of the parties interested in opposing the claim (*n*), or was only exercised at long intervals for a

nation of a term for life or years: sect. 8. "Reversion" means *reversion* strictly, and must not be confounded with *remainder*; *Symons* v. *Tucker*, 15 Q. B. D. 629.

(*f*) Sect. 8. See *Pal* v. *Shannon*, 18 Q. B. 568; on the interpretation of the section see *Laird* v. *Briggs*, 19 Ch. D. 22, 33, per Jessel, M. R.

(*g*) *Bright* v. *Walker*, 1 C. M. & R. 219.

(*h*) *S. C.* 221.

(*i*) *Vide ante*, p. 105.

(*k*) *Onley* v. *Gardiner*, 4 M. & W. 500.

(*l*) See *Beeston* v. *Weate*, 5 E. & B. 986.

(*m*) See *Parker* v. *Mitchell*, 11 A. & E. 788; *Flight* v. *Thomas*, 8 C. & F. 231; *Lowe* v. *Carpenter*, 6 Ex. 825.

(*n*) See *Bright* v. *Walker*, 1 C. M. & R. 219; *Tickle* v. *Brown*, 4 A. & E. [illegible]; *Partridge* v. *Scott*, 3 M. & W. 220; *Wanship* v. *Hudspeth*, 10 Ex. 5. As to the rights of reversioners, see *Beggan* v. *McDonald*, 2 L. R. Ir. 560; *Laird* v. *Briggs*, 19 Ch. D. 22. And it has been held in Ireland that one lessee can by forty years' enjoyment acquire a right of way against another lessee from the same lessor, notwithstanding the unity of seisin; *Beggan* v. *McDonald*; *Fahey* v. *Dwyer*, 4 L. R. Ir. 271; *Harris* v. *De Pinna*, 33 Ch. D. 238, 251 *et seq.*

particular purpose (*o*), or on sufferance (*p*), or that the party exercising it was himself, during all or any part of such period, entitled to the possession of the property sought to be affected (*q*). In cases falling under sections 1, 4 and 7, of the Act, an enjoyment, as of right, may be proved by showing enjoyment for several periods, amounting together to the statutory time; and that, during the entire intervals between such periods, and between the last of them and the action (if such interval intervened), the estate sought to be affected was in the hands of a tenant for life or for years exceeding three years (*r*).

Except in cases of light.

But, as respects the easement of light, the mere fact of uninterrupted enjoyment for twenty years, otherwise than by consent given by deed or writing, confers an absolute title. The enjoyment need not be "as of right;" so that proof of a parol licence is immaterial (*s*); and so as there be no submission to or acquiescence in (*t*) an *adverse* interruption, absolute continuity of enjoyment is not essential (*u*); nor does the existence of disabilities or particular estates make any difference; but the enjoyment of the access of light must have been in the character of an *easement*, distinct from the enjoyment of the land sought to be affected; so that sixty years' enjoyment of lights looking out upon a garden which the owners of the house had held during that period as tenants from year to year, was held insufficient to confer a title (*x*).

(*o*) *Hollins* v. *Verney*, 13 Q. B. D. 304.

(*p*) *Tone* v. *Preston*, 24 Ch. D. 739; *Barry* v. *Lowry*, 11 I. R. C. L. 183.

(*q*) *Onley* v. *Gardiner*, 4 M. & W. 500; *Clayton* v. *Corby*, 2 Q. B. 813; *Clay* v. *Thackrah*, 9 C. & P. 47; *Battishill* v. *Reed*, 18 C. B. 696; *Harbidge* v. *Warwick*, 3 Ex. 552; *James* v. *Plant*, 4 A. & E. 761; *Simper* v. *Foley*, 2 J. & H. 555. As to the non-extinguishment of a necessary easement by unity of seisin, see *Pheysey* v. *Vicary*, 16 M. & W. 484. Compare on this point *Ladyman* v. *Grave*, 6 Ch. 763; and *Outram* v. *Maude*, 17 Ch. D. 391.

(*r*) *Clayton* v. *Corby*, 2 Q. B. 813.

(*s*) *Mayor of London* v. *Pewterers' Company*, 2 Mo. & R. 109; *Flight* v. *Thomas*, 11 A. & E. 688, 695; and see *Plasterers' Co.* v. *Parish Clerks' Co.*, 6 Ex. 630.

(*t*) *Glover* v. *Coleman*, L. R. 10 C. P. 108.

(*u*) *Ladyman* v. *Grave*, 6 Ch. 763.

(*x*) *Harbidge* v. *Warwick*, 3 Ex. 552.

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Interruption – what it is.

By interruption, it may be observed, is meant an adverse obstruction, and not a mere discontinuance of user (*y*); but the question, whether a discontinuance was voluntary or otherwise, is one for a jury (*z*); and although interruptions for less than a year will not in themselves prevent the operation of the Statute, yet they have a material bearing upon the question whether the enjoyment has, in fact, been "as of right" (*a*); and an interruption by a stranger is within the Act (*b*). So that, as between vendor and purchaser, it would seem to be necessary to give evidence of (so near as may be) continuous user (*c*). It has been held, in the case of light, that payment of rent for the easement is not an "interruption;" but the Court left untouched the question whether such payment showed the enjoyment to be different from that contemplated by the Act (*d*). It has been decided by the House of Lords (*e*), affirming the decisions of the Court of Queen's Bench and Exchequer Chamber, that, under the 4th section of the Statute, which provides that no act shall be deemed an interruption, unless submitted to or acquiesced in for one year, a party who has uninterruptedly enjoyed or used the easement or right for any period exceeding one year short of the term which would be sufficient to confer a statutory title, can, upon being disturbed in his enjoyment or user at any time within the last year of the statutory term, at once claim the benefit of the Statute.

Title under the Statute of Limitations.

By the 3 & 4 Will. IV. c. 27, the time within which proceedings could be commenced either at Law or in Equity for the recovery of any *land* (*f*), or of any rent, was restricted to a period of twenty years (*g*), or, in case of continuous (*h*)

(*y*) *Carr* v. *Foster*, 3 Q. B. 581; and see *Reg.* v. *Chorley*, 12 Q. B. 515; *Ladyman* v. *Grave*, 6 Ch. 763.

(*z*) *Carr* v. *Foster*, *suprà*.

(*a*) *Eaton* v. *Swansea Water Works Co.*, 17 Q. B. 267, 274.

(*b*) *Davies* v. *Williams*, 16 Q. B. 546.

(*c*) See *Lowe* v. *Carpenter*, 6 Ex. 825; *Hollins* v. *Verney*, 13 Q. B. D. 304.

(*d*) *Plasterers' Co.* v. *Parish Clerks' Co.*, 20 L. J. Ex. 362, 364; 6 Ex. 630.

(*e*) *Flight* v. *Thomas*, 8 C. & F. 231.

(*f*) Or title deeds.

(*g*) See sects. 2 and 24.

(*h*) *Goodall* v. *Sherratt*, 3 Dr. 216.

disabilities (*i*), forty years from the time at which the right to proceed for the recovery of such land or rent first accrued to the plaintiff, or to the party through whom he claimed (*k*). These limits of time have been still further reduced to twelve and thirty years respectively by the Real Property Limitation Act, 1874 (*l*), which came into operation on the 1st January, 1879, and with which the earlier Act, except so far as its provisions are expressly repealed, is to be read and construed (*m*). The old doctrine of non-adverse possession was done away with by the earlier Act, except in cases falling within the 15th section (*n*), which has now ceased to be operative.

"Land"—its meaning within the Act.

The word "land" by force of the first section of the earlier Act includes all corporeal hereditaments, and also tithes (except tithes belonging to a spiritual or eleemosynary corporation sole), and any share or interest therein (*o*). The operation of the Statute is confined to cases where there are two parties, each claiming an interest in the land or tithes: and does not apply as between tithe-owner and terre-tenant (*p*); but by 53 Geo. III. c. 127, s. 5, the period of account in equity for tithes as between the terre-tenant and tithe-owner is limited to six years before filing the bill (*q*).

"Rent"—its meaning within the Act.

The word "rent" by the same section includes heriots, and all services and suits for which a distress may be made; and all annuities (*qq*), and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole). The term has been held to include quit-rents (*r*), and even a

(*i*) See sects. 16, 17, 18 and 19.

(*k*) See sect. 1; and *Doe* v. *Edmonds*, 6 M. & W. 295; *Magdalen Hospital* v. *Knotts*, 4 App. Ca. 324; *Mayor of Brighton* v. *Guardians of Brighton*, 5 C. P. D. 368.

(*l*) 37 & 38 V. c. 57.

(*m*) Sect. 9.

(*n*) *Nepean* v. *Doe*, 2 M. & W. 894.

(*o*) As to the statutory meaning of the word "land" in future Acts of Parliament, see 13 & 14 V. c. 21, s. 4.

(*p*) See *Dean and Chapter of Ely* v. *Cash*, 15 M. & W. 617.

(*q*) *Goode* v. *Waters*, 20 L. J. Ch. 72.

(*qq*) *Re Nugent's Tr.*, 19 L. R. Ir. 140.

(*r*) *De Beauvoir* v. *Owen*, 5 Ex. 166, 176; *Lord Chichester* v. *Hall*, 17 L. T. O. S. 121.

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tithe rent-charge (s); but not rent reserved on a demise as between tenant and reversioner (t). So, heriots payable at uncertain intervals, and rent payable at greater intervals than twenty years (a case not likely to happen), do not fall within the statutory definition (u).

What is the commencement of the suit.

Issue of the writ, and not service, is the commencement of the action for the purposes of the Acts (x); and as an amended bill was held to date from the filing of the original bill (y), so, it is conceived, an amended writ dates for this purpose from the issue of the original writ: but unnecessary delay in instituting or prosecuting the proceedings may disentitle the plaintiff to the assistance of the Court (z). The appointment of a receiver prevents time from running in favour of (a), but not as against (b), a stranger to the suit.

Saving in case of disability, &c.

The Act of 1874 contains a saving clause in case of disability arising from infancy, coverture, idiotcy, lunacy, or unsoundness of mind (c); in any of which cases an action may be brought at any time within six (under the earlier Act, ten) years next after the time at which the person, to whom the right to bring the action shall have first accrued, shall have ceased to be under such disability, or shall have died. This saving clause applies where there is a succession of disabilities without break; thus (d), where A., being an infant when

(s) *Irish Land Commission* v. *Grant*, 10 App. Ca. 14.

(t) *Grant* v. *Ellis*, 9 M. & W. 113.

(u) *Lord Zouche* v. *Dalton*, L. R. 10 Ex. 172.

(v) *Coppin* v. *Gray*, 1 Y. & C. C. C. 205; *Morris* v. *Ellis*, 7 Jur. 113; *Purcell* v. *Blennerhassett*, 3 J. & L. 24; *Harrisson* v. *Duignan*, 2 D. & War. 295; *Forster* v. *Thompson*, 4 D. & War. 303; but see *A.-G.* v. *Hall*, 11 Pr. 760.

(y) *Blair* v. *Ormond*, 1 De G. & S. 428; *Byron* v. *Cooper*, 11 C. & F. 556.

(z) *Forster* v. *Thompson*, *Coppin* v. *Gray*, *ubi supra*.

(a) *Wilson* v. *Fitz*, 3 D. & War. 104, 123; *Bertie* v. *Lord Abingdon*, 3 Mer. 567; *Penney* v. *Todd*, 26 W. R. 502. See and consider *Re Greene's Ist.*, 13 L. R. Ir. 461.

(b) *Harrisson* v. *Duignan*, 2 D. & War. 295.

(c) Sect. 3. This section does not apply as between mortgagor and mortgagee; *Kinsman* v. *Rouse*, 17 Ch. D. 104; *Forster* v. *Patterson*, *ibid.* 132.

(d) *Borrows* v. *Ellison*, L. R. 6 Ex. 128; and cf. *Lambert* v. *Browne*, 5 I. R. C. L. 218.

her title accrued in 1833, married during minority and continued under coverture until she and her husband brought their action in 1870, it was held that the action was maintainable. No action is to be brought where a person has been subject to any of these disabilities, except within thirty (under the earlier Act, forty) years after the right of action first accrued (*e*); and no time beyond this maximum limit is allowed for a succession of disabilities (*f*).

Right when deemed to have accrued in certain cases.

The 3rd section of the earlier Act fixes the time at which, in certain specified cases, the right shall be deemed to have accrued: these cases, however, are put merely by way of illustration, and not with the view of limiting the operation of the 2nd section (*g*). The general principle is, that when a person has been in possession or receipt of the profits of the land, or in receipt of rent, the right accrued at the time when he ceased to hold such possession or receive such profits or rent (*h*); while in the case of a person who has never had such possession or receipt, the right accrued at the time when he first became entitled (whether by descent, alienation, falling in of a remainder or reversion, forfeiture, devise (*i*) or otherwise) to enter into such possession or receipt. The possession of an agent is the possession of his principal; so that a principal was held to have acquired a possessory title to an estate, by receiving the rents of it for twenty years through his agent, even as against the agent who was in fact himself the rightful owner (*k*); and on the same principle where an agent is in receipt of the rents as an agent, time will not run against his principal, although in fact he never received anything from

General rule.

(*e*) Sect. 5.

(*f*) Sect. 18 of the earlier Act.

(*g*) See *James* v. *Salter*, 2 Bing. N. C. 505; 4 Sc. 168.

(*h*) Cf. *Owen* v. *De Beauvoir*, 16 M. & W. 547. As to dispossession and discontinuance of possession under sect. 3, see *Leigh* v. *Jack*, 5 Ex D. 264. In *Adnam* v. *Earl of Sandwich*, 2 Q. B. D. 485, a Divisional Court held that the provisions of the statute only apply where there has been an omission by the party entitled to a rent to enforce his remedies with knowledge that the rent has not been paid; *sed quære*.

(*i*) See *James* v. *Salter*, 4 Sc. 168, 180.

(*k*) *Williams* v. *Pott*, 12 Eq. 149.

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As against mortgagee.

the agent (*l*). A mortgagee may, however, recover the mortgaged land at any time within twelve years after the last payment of principal or interest, notwithstanding twelve years or upwards may have elapsed since his right to enter accrued under the mortgage deed (*m*): and this, although a valid title to the land, may, under the Statute, have been acquired by a stranger as against the mortgagor (*n*): and a purchaser from a mortgagee under a power of sale in the mortgage deed, or from the mortgagee and mortgagor, is also, it appears, within the saving (*o*). Where the mortgage deed contains no provision for quiet enjoyment by the mortgagor until default, the mortgagee upon the execution of the deed has an immediate right of entry, and ejectment must be brought within twelve years after its date, in default of any payment by the mortgagor (*p*). It seems the better opinion that a mortgagee's *primâ facie* absolute title by twelve years' possession is not defeated by his having kept accounts of the rents which he has received, or by his having otherwise acted as if he were only mortgagee (*q*). Time does not run against the grantee of an annuity charged on land, so long as the annuity is paid (*r*).

As against administrator.

As against an administrator, time runs from the death of the person whose chattels he claims to administer (*s*). If a will contains no appointment of an executor or if the executor renounces, a legatee under it whose legacy is charged on land must, it is conceived, obtain the appointment of an administrator within twelve years from the death of the testator, or else be barred of his right to recover the legacy (*t*).

(*l*) *Smith* v. *Bennett*, 30 L. T. 100.

(*m*) 7 Will. IV. & 1 V. c. 28. Under a foreclosure decree, the right to bring an action for possession accrues as from the date of the decree; *Pugh* v. *Heath*, 7 App. Ca. 235.

(*n*) *Doe* v. *Eyre*, 17 Q. B. 366; *Ford* v. *Ager*, 2 N. R. 366.

(*o*) *Doe* v. *Massey*, 17 Q. B. 373; *Doe* v. *Williams*, 5 A. & E. 291, 297.

(*p*) *Doe* d. *Rylance* v. *Lightfoot*, 8 M. & W. 553.

(*q*) *Baker* v. *Wetton*, 14 Sj. 426; Sug. R. P. 117.

(*r*) *Searle* v. *Colt*, 1 Y. & C. C. C. 36.

(*s*) Sect. 6. See *Holland* v. *Clark*, 1 Y. & C. C. C. 151, 170; *Davies* v. *Williams*, 34 Ch. D. 558.

(*t*) 37 & 38 V. c. 57, s. 8.

As against remainderman.

Time does not begin to run against a remainderman, until his right to possession accrues (*u*); but as against his right to recover damages from a tenant for life who has committed a tortious act, *e.g.*, who has wrongfully cut timber, the Statute runs as from the date of such act (*x*). Where a reversioner in fee grants to his lessee a concurrent lease, the reversioner does not acquire an estate in possession, although the former lease became surrendered by operation of law on the granting of the new lease; and therefore time does not run against him, the surrender being merely by estoppel (*y*).

In case of *express* trust.

In the case of an express trust, *i.e.*, a trust expressly declared by a deed, will, or other written instrument, the right does not accrue under the 25th section of the Act until a conveyance has been made to a purchaser for valuable consideration; and then only as against such purchaser and persons claiming under him (*z*): but, in order to bring a case within this section, the relation of trustee and *cestui que trust* must be clearly constituted (*a*); though, of course, it is not necessary that the word "trust" should be employed in order to constitute the relation (*b*). The trust contemplated by the section has been defined to be a trust expressed in writing or by word of mouth, as distinguished from a trust arising out of the acts of the parties, *i.e.*, by implication of law (*c*). Thus, a solicitor is not a trustee for his client so as to come within the section (*d*): nor is a mortgagee for the

(*u*) *Thompson* v. *Simpson*, 1 D. & War. 459, 489.

(*x*) *Seagram* v. *Knight*, 3 Eq. 398; 2 Ch. 628; *Higgenbotham* v. *Hawkins*, 7 Ch. 676.

(*y*) *C. C. C. Oxford* v. *Rogers*, 49 L. J. C. L. 4; and cf. *Lyon* v. *Reed*, 13 M. & W. 285.

(*z*) Sect. 25. *A.-G.* v. *Hunt*, 4 Ha. 147; *Petre* v. *Petre*, 1 Dr. 397; and see as to express trusts, *Salter* v. *Cavanagh*, 1 D. & Wal. 668; *Burne* v. *Robinson*, *ib.* 668; *Knight* v. *Bowyer*, 2 D. & J. 421; *Bullock* v. *Downes*, 9 H. L. C. 1; *Nugent* v. *Nugent*, 15 L. R. Ir. 321.

(*a*) *Law* v. *Baguell*, 4 D. & War. 398; *Young* v. *Lord Waterpark*, 13 Si. 204; 10 Jur. 1; *Burne* v. *Robinson*, *ubi supra*; and see *Yardley* v. *Holland*, 20 Eq. 428.

(*b*) *Commrs. of Charitable Donations* v. *Wybrants*, 2 J. & L. 182, 197; *Hunt* v. *Bateman*, 10 Ir. Eq. R. 300.

(*c*) *Sands* to *Thompson*, 22 Ch. D. 614, per Fry, J. And by virtue of the Judicature Act, 1873, s. 25 (3), the section applies equally to personalty and realty: *Benner* v. *Berridge*, 18 Ch. D. 254, 262.

(*d*) *Watson* v. *Woodman*, 20 Eq. 721.

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mortgagor, except in respect of the surplus moneys upon a sale (e). But the Courts have in a few cases extended this definition to cases which do not strictly fall within it, *e.g.*, to that of an agent who holds money for his principal (f); and a receiver, appointed in an action, has been held to be an express trustee within the section of moneys received by him for the persons entitled (g). The chief difficulty which arises on the definition is whether an intention to constitute a trust has been expressed. This is a question on which it is impossible to deduce any general rule from the cases, since the answer to it, in each of them, depends entirely on the construction of the language relied on as creating the trust (h).

Under Judicature Act, 1873.

We may here remark that by the Judicature Act, 1873, the claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, is not to be barred by any Statute of Limitations (i).

Real Property Limitation Act, 1874.

Under section 10 of the Real Property Limitation Act, 1874 (k), an express trust no longer prevents time from running against proceedings to recover any sum of money or legacy charged upon or payable out of any land or rent at law or in equity and secured by such trust. And it would seem that the personal remedy against the trustee is also barred on the principle of the recent cases of *Sutton* v. *Sutton* (l) and *Fearnside* v. *Flint* (m).

Cases of *express* trust within the section.

A trust by deed or will for the payment of debts, annuities, portions or the like, is within the 25th section of the old

(e) *Banner* v. *Berridge*, 18 Ch. D. 254; and after six years no evidence is admissible to prove that there was a surplus: *ibid.*

(f) *Burdick* v. *Garrard*, 5 Ch. 233; *Gray* v. *Bateman*, 21 W. R. 137; *Lake* v. *Bell*, 34 Ch. D. 462.

(g) *Seagram* v. *Tuel*, 18 Ch. D. 296.

(h) *Edwards* v. *Warden*, 1 Ap. Ca. 281; *Thomson* v. *Eastwood*, 2 *ib.* 215; *Cunningham* v. *Foot*, 3 *ib.* 974; *Dawkins* v. *Lord Penrhyn*, 4 *ib.* 51.

(i) See 36 & 37 V. c. 66, s. 25, sub-s. 2.

(k) 37 & 38 V. c. 57.

(l) 22 Ch. D. 511.

(m) *Ib.* 679.

Cases not within the section.

Act (*n*); so, also, is a direction to trustees to pay the testator's debts, followed by a devise to them, subject to the payment thereof, upon trust for successive beneficiaries (*o*); but a charge of debts, even though coupled with a direction to pay them, is not an express trust, where there is no devise to the executors (*p*); so, a beneficial devisee of realty, charged with the payment of debts or legacies, is not a trustee within the section (*q*): but where an express trust is created with regard to charges upon land, it falls as much within the saving of the Statute, as if the trust had applied to the land itself (*r*); so, also, probably, where the land is devised upon trust for sale with a direction that the proceeds are to be considered as personal estate, and the land remains unsold, unless the parties interested have elected to take the property as real estate (*s*). Where the assignee of a bankrupt took for his own benefit a conveyance from the trustee of a will of the legal estate in property to which the bankrupt was equitably entitled, it was held that he took it upon an express trust; *viz.*, that declared by the will: and that the Statute afforded no defence to a suit for the recovery of the estate, and the mesne profits (*t*). A purchaser's liability for unpaid purchase-money, under the ordinary vendor's lien, is not an express trust (*u*); nor is a mortgage under the form of a trust for sale (*x*).

The section only applies as between trustee and *cestui que trust.*

But the rule that a trust is not barred by length of time, applies only as between *cestui que trust* and trustee; and not

(*n*) *Dillon* v. *Cruise*, 3 Ir. Eq. R. 70; *Young* v. *Lord Waterpark*, 13 Sim. 204; 10 Jur. 1; *Hunt* v. *Bateman*, 10 Ir. Eq. R. 360; *Francis* v. *Grover*, 5 Ha. 39.

(*o*) *Hunt* v. *Bateman*, *supra*.

(*p*) *Dickinson* v. *Teasdale*, 1 D. J. & S. 52; and cases there cited; 31 Beav. 511.

(*q*) *Proud* v. *Proud*, 32 B. 234; and see *Jacquet* v. *Jacquet*, 27 B. 332. As to an executor constituting himself a trustee for a pecuniary legatee, see *Tyson* v. *Jackson*, 30 B. 384.

(*r*) *Barrowes* v. *Gore*, 6 H. L. C. 907, 961.

(*s*) *Matlow* v. *Bigg*, 18 Eq. 246; 1 Ch. D. 385.

(*t*) *Sturgis* v. *Morse*, 3 D. & J. 1; 2 D. F. & J. 223.

(*u*) *Toft* v. *Stephenson*, 1 D. M. & G. 28.

(*x*) *Locking* v. *Parker*, 8 Ch. 30; *Re Alison*, 11 Ch. D. 284; *Chapman* v. *Corpe*, 27 W. R. 781.

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as between trustee and *cestui que trust* on the one side, and strangers on the other (*y*): and the case of one *cestui que trust* ousting his *co-cestui que trust* is not within the section (*z*).

Fraud.

In cases of concealed (that is, of designed and hidden (*a*)) fraud, time does not begin to run until the fraud was, or, with reasonable diligence, might have been, discovered (*b*): but this is not to affect a *boná fide* purchaser for valuable consideration without notice or suspicion of the fraud. In the case of a firm, it has been held that the fraud of one member prevents time from running in favour of his copartners, although innocent of, and deriving no benefit from, the fraud (*c*).

Rules of Equity as to acquiescence, &c., preserved.

The earlier Act expressly provides against any interference with the rules which guide a Court of Equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of the Act (*d*).

Charities within the Acts.

The Acts contain no special saving in favour of charities; and it was for a long time doubted, and the earlier authori-

(*y*) See *Llewellyn* v. *Mackworth*, Barn. C. 445.

(*z*) *Burroughs* v. *M'Creight*, 1 J. & L. 290; *Lister* v. *Pickford*, 34 B. 576; *Bolling* v. *Holday*, 31 W. R. 9; *Knight* v. *Bowyer*, 2 D. & J. 43. See as to agents, *A.-G.* v. *Corp. of London*, 2 M. & G. 259. The institution of a suit to carry out the trusts of a will, of course does not preserve the right of the disinherited heir: *Simmons* v. *Rudall*, 1 Si. N. S. 115.

(*a*) *Petre* v. *Petre*, 1 Dr. 397; *Dean* v. *Thwaite*, 21 B. 621; *Cheatham* v. *Hoare*, 9 Eq. 571; *Vane* v. *Vane*, 8 Ch. 383; *Willis* v. *Earl Howe*, 50 L. J. Ch. 4. Actual possession for sixty years, even without the knowledge of the owner, who during that period has discontinued possession, gives a title in the absence of designed fraud; *Rains* v. *Buxton*, 14 Ch. D. 537; and see *Metropolitan Bank* v. *Heiron*, 5 Ex. D. 537.

(*b*) Sect. 26; and *Lewis* v. *Thomas*, 3 Ha. 26; *Dean* v. *Thwaite*, *supra*; *Smith* v. *Acton*, 26 B. 210. The recent case of *Gibbs* v. *Guild*, 9 Q. B. D. 59, of course refers only to the statute 21 Jac. 1, c. 16, which contains no such express exception.

(*c*) *Blair* v. *Bromley*, 2 Ph. 354; as to fraud consisting in secretly purchasing from a person *non compos*, see *Lewis* v. *Thomas*, 3 Ha. 26; *Greenslade* v. *Dare*, 20 B. 284; and compare *Manley* v. *Bewicke*, 3 K. & J. 346.

(*d*) Sect. 27. See *Life Assoc. of Scotland* v. *Siddal*, 2 D. F. & J. 72, 73; *Thompson* v. *Eastwood*, 2 Ap. Ca. 215; *Blake* v. *Gale*, 31 Ch. D. 196.

ties seem to leave it an open question (*e*), whether the Statute was intended to apply to them. The ground for this doubt was, that prior to the Statute, no lapse of time was a bar to the claims of a charity; and the question was, whether this ancient equitable rule was still to prevail; or whether, in the absence of express exemption, the ordinary statutory limitation was applicable in the case of a purchaser of a charity estate. It is now, however, well settled that charities fall within the general prohibition contained in the 24th section; and the ordinary statutory bar extends, not merely to an absolute alienation, but also to an improvident lease of the charity estate (*f*). But in order that the charity may be bound, there must be some person competent to make a claim on its behalf; thus, where there is no trustee, or none properly appointed, or where there are no ascertained objects of the charity, the Statute will not run (*g*): and where, as is generally the case, the charity estates are held upon express trusts, they fall within the saving of the 25th section.

Entry.

No person is to be deemed to have been in possession of any land, within the meaning of the Acts, by reason merely of his having made an entry thereon (*h*): but this refers to a merely formal entry. If A., the owner, actually turn B., the occupier, out of possession, this saves the statutory bar, although A. retain possession for only one hour, and B. immediately resume it (*i*). So, where a writ of ejectment was served by the owner on a tenant at will, and it was then verbally arranged that the latter should remain in the

(*e*) See *Incorporated Society* v. *Richards*, 1 D. & War. 288; *A.-G.* v. *Persse*, 2 D. & War. 69; and see *A.-G.* v. *Mayor of Coventry*, 2 Vern. 399; but see *Commrs. of Charitable Donations* v. *Wybrants*, 2 J. & L. 182, 195; *Magd. Coll.* v. *A.-G.*, 6 H. L. Ca. 189, 206; *A.-G.* v. *Wilkins*, 17 B. 285; *A.-G.* v. *Davey*, 4 D. & J. 136; *A.-G.* v. *Payne*, 27 B. 168.

(*f*) *A.-G.* v. *Payne*, and *A.-G.* v. *Davey*, *suprà*; and see *Magdalen Coll.* v. *A.-G.*, 6 H. L. C. 189; *Magdalen Hospital* v. *Knotts*, 4 Ap. Ca. 324.

(*g*) *Incorporated Society* v. *Richards*, 1 D. & War. 258; *A.-G.* v. *Persse*, 2 D. & War. 67.

(*h*) 3 & 4 Will. IV. c. 27, s. 10.

(*i*) *Randall* v. *Stevens*, 2 E. & B. 641.

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occupation of part of the property during his life, it was held that this amounted to an actual entry; and that as a new tenancy was created, the Statute began to run from this time, and not from the date of the original tenancy (*k*).

Tenancy at will.

The 7th section of 3 & 4 Will. IV. c. 27 enacts, that the right of a person entitled subject to a tenancy at will is to be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined (*l*); but it provides that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will within the meaning of this clause to his mortgagee or trustee. This proviso is applicable only to cases of *express* trusts; and not to cases of a quasi-fiduciary character (*m*). Where a purchaser is let into possession before completion, he is *primâ facie* a tenant at will within the section (*n*). In cases of express trust, a *cestui que trust*, whose possession is consistent with the trust, is, for general purposes, tenant at will to his trustee (*o*); and the object of the above provision seems to have been, to preserve the legal estate of the trustee, which, under the old law, was secured by the necessity that possession should be adverse in order to take away the right of entry. However, in the case of *Doe* d. *Jacobs* v. *Phillips* (*p*), the Court of Queen's Bench seem to have considered the trustee of a term was barred by the possession of his *cestui que trust*: the opinions expressed upon this point were, however, extrajudicial; for, admitting the *cestui que trust* to have been tenant at will, the trustee before bringing the action should have determined the tenancy by notice, which he had not done (*q*); but these

Mortgagor and *cestui que trust*.

(*k*) *Lade* v. *Matthews*, 13 C. B. N. S. 753; *Randall* v. *Stone*, 2 E. & B. 641.

(*l*) *Day* v. *Day*, L. R. 3 P. C. 751, *Mayor of Brighton* v. *Guardians of Brighton*, 5 C. P. D. 365.

(*m*) *Drummond* v. *Sant*, L. R. 6 Q. B. 763; *Sands* to *Thompson*, 22 Ch. D. 614.

(*n*) *Doe* v. *Reid*, 4 Man. & G. 30; and see *Doe* v. *Carter*, 9 Q. B. 863; *Westbrook* v. *Kendall*, 3 F. & F. 59.

(*o*) See 1 Jarm. Conv. 28; Sug. 480.

(*p*) 10 Q. B. 130.

(*q*) As to what conduct amounts to an admission of a subsisting tenancy at will, see *Doe* v. *Groves*, 10 Q. B. 486.

dicta in *Doe* v. *Phillips* have not been followed (*r*). In a modern case, where in 1771 parties under a building agreement and a private Act of Parliament became entitled to peppercorn-leases for 99 years of a piece of reclaimed land adjoining the land comprised in the original agreement, and they entered and retained possession without acknowledgment of the freeholder's title or any payment of rent (the full rent mentioned in the agreement having been reserved upon leases of the lands therein comprised), it was held that their possession had been merely that of *cestuis que trust*: and that they were bound, on the expiration of the term, to give up the reclaimed land as well as the other land (*s*); so, too, the encroachment of a tenant, either with or without the consent of his landlord, does not create a tenancy within the section, and time will not run under the Statute until the determination of the lease (*t*). It has, however, been held, that where land is vested in trustees in fee, in trust for A. for life, with remainders over, and A. having never been in the actual personal occupancy of the land, allows B. to occupy for the statutory period, without payment of rent, or acknowledgment of title, B. thereby acquires a valid title to the *fee simple* (*u*):—a doctrine, the practical importance of which can scarcely be over-estimated. A Court of Equity, however, will presume that a father entering on the estates of his infant children, so entered as their natural guardian, and not tortiously, unless the contrary be clearly shown; and will treat the case as that of a trustee (*x*). So, the entry by an uncle (the nearest male relative) upon lands of his infant niece, was not considered to

(*r*) *Garrard* v. *Tuck*, 8 C. B. 231: and see *Young* v. *Lord Waterpark*, 10 Jur. 1; *Cox* v. *Dolman*, 2 D. M. & G. 599; Lord St. Leonards' judgment in *Scott* v. *Scott*, 4 H. L. C. 1085; *Lord Mansfield* v. *Ogle*, 7 D. M. & G. 181; *Drummond* v. *Sant*, L. R. 6 Q. B. 763. Executory trust held not within the section: *Stewart* v. *Marquis of Conyngham*, 1 Ir. Ch. R. 534, 553.

(*s*) *Drummond* v. *Sant*, L. R. 6 Q. B. 763, 766.

(*t*) *Whitmore* v. *Humphrys*, L. R. 7 C. P. 1. See, as to copyholds, *A.-G.* v. *Tomline*, 5 Ch. D. 750.

(*u*) *Malling* v. *Leak*, 16 C. B. 652.

(*x*) *Thomas* v. *Thomas*, 2 K. & J. 79; and see *Wall* v. *Stanwick*, 34 Ch. D. 763.

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be an entry by a stranger (*y*). Where the tenancy determined before the passing of the Act, the right of entry is to be considered as having accrued at the time of such determination (*z*); but, where the tenancy was subsisting when the Act came into operation, the right is barred by the lapse of twenty years from the end of one year after the commencement of the tenancy (*a*). Where the money due upon a mortgage has been paid off, but the legal estate has not been reconveyed to the mortgagor, a tenancy at will is created between mortgagee and mortgagor, and time begins to run accordingly (*b*).

Tenancy from year to year.

The right of a person entitled subject to a tenancy from year to year or other period, without any lease in writing (*c*), is to be deemed to have accrued at the end of the first year or other period, or last receipt of rent, which shall last happen (*d*). It has been held, that the performance of a service for which distress might have been made, *e.g.*, sweeping the church and tolling the bell, amounts to payment of rent within the meaning of this section (*e*).

Right of action saved by acknowledgment of title.

The acknowledgment in writing of title, given to the person entitled or his agent by the person in the actual possession or receipt of the profits of the land or receipt of the rent, is equivalent to such possession or receipt by the person so entitled (*f*), and time is constantly running from the last

(*y*) *Pelly* v. *Bassomb*, 4 Giff. 390; aff. 11 Jur. N. S. 52, but Turner, L. J., declined to express any opinion.

(*z*) *Doe* v. *Thompson*, 6 A. & E. 721; *Doe* v. *Page*, 5 Q. B. 767; *Doe* v. *Bold*, 11 Q. B. 127; as to what amounts to a determination of a tenancy at will, see *Turner* v. *Doe*, 9 M. & W. 643; *Doe* v. *Carter*, 9 Q. B. 863; *Randall* v. *Stevens*, 2 E. & B. 641.

(*a*) *Doe* v. *Moore*, 9 Q. B. 555; *Doe* v. *Carter*, 9 Q. B. 863; *Doe* v. *Eyre*, 17 Q. B. 366; see *Randall* v. *Stevens*, 2 E. & B. 641.

(*b*) *Sands* to *Thompson*, 22 Ch. D. 614.

(*c*) Which must be an instrument passing an interest. *Doe* v. *Gower*, 17 Q. B. 589.

(*d*) 3 & 4 Will. IV. c. 27, s. 8; on the construction of which see *Lyell* v. *Kennedy*, 18 Q. B. D. 796.

(*e*) *Doe* v. *Benham*, 7 Q. B. 976; as to the 8th sect. being retrospective, see *Doe* v. *Sumner*, 14 M. & W. 39. As to the provisions of sect. 9, where the lease is in writing, see *post*, p. 447.

(*f*) Sect. 14.

acknowledgment (*g*). In the recent case of *Bunting* v. *Sargent* (*h*), Sir George Jessel held that where rent had not been paid for twenty years, and some arrears were paid subsequently as such, within five years of action brought, the plaintiff's right was not barred. This decision is somewhat difficult to reconcile with the decisions of the same learned judge in *Re Alison* (*i*) and *Sanders* v. *Sanders* (*k*).

What is a sufficient acknowledgment under the 14th section.

Whether a particular writing amounts to a sufficient acknowledgment of title within the 14th section, is a question for the Court, and not for a jury to decide (*l*): an acknowledgment may of course be made out from letters (*m*). If contained in a deed, it speaks not from its date, but from the time of execution (*n*). An answer in a Chancery suit, though made under compulsion, is a sufficient acknowledgment (*o*). In one case (*p*), a question seems to have been raised whether an inscription on a stone let into a wall, stating by whom it was built and to whom it belonged, was or was not an acknowledgment within the Act; but the Court of Appeal held that while the inscription remained on the wall no question of the Statute, or of adverse possession, could properly arise.

By whom the acknowledgment must be

Under this section (*q*), the acknowledgment must be signed by the party in possession; and the signature of an agent is

(*g*) *Burroughs* v. *M'Craight*, 1 J. & L. 290, 304.

(*h*) 13 Ch. D. 330.

(*i*) 11 Ch. D. 284.

(*k*) 19 Ch. D. 373; *post*, p. 452.

(*l*) *Doe* v. *Edmonds*, 6 M. & W. 295; *Morrell* v. *Frith*, 3 M. & W. 402; *Sidwell* v. *Mason*, 3 Jur. N. S. 649.

(*m*) *Incorporated Soc.* v. *Richards*, 1 D. & War. 290; *Fursdon* v. *Clogg*, 10 M. & W. 572; *Lord St. John* v. *Boughton*, 9 Sl. 219.

(*n*) *Jaynes* v. *Hughes*, 10 Ex. 430; *Lewis* v. *Thomas*, 3 Ha. 34.

(*o*) *Goode* v. *Job*, 5 Jur. N. S. 145; *Moodie* v. *Bannister*, *ib.* 402; and see as to what is a sufficient acknowledgment cases cited above, and *Tidlock* v. *Robey*, 12 Sl. 402; *Holland* v. *Clark*, 1 Y. & C. C. C. 151; *Cauley* v. *Furnell*, 12 C. B. 291; *Smith* v. *Thorne*, 18 Q. B. 134; *Chasemore* v. *Turner*, L. R. 10 Q. B. 500; *Quincey* v. *Sharpe*, 1 Ex. D. 72; *Sleet* v. *Lindsay*, 2 Ex. D. 314; *Green* v. *Humphreys*, 26 Ch. D. 474; *Ingram* v. *Little*, 1 C. & E. 186.

(*p*) *Phillipson* v. *Gibbon*, 6 Ch. 428.

(*q*) Compare sect. 28, where the acknowledgment must be signed by the mortgagee himself, or the person claiming through him.

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signed under this section.

not sufficient, as in the cases provided for by the 40th and 42nd sections. As between landlord and tenant, the receipt of rent is equivalent to the receipt of the profits of the land (*r*); but the performance of a service for which no distress can be made, *e.g.*, keeping up a grindstone on the land for the use of the parties beneficially interested (*s*), does not prevent the Statute from running in favour of the occupiers.

Possession of one joint owner does not save the right of another.

The possession, &c., of one coparcener, joint tenant, or tenant in common, is not to be considered as the possession, &c., of any other (*t*); nor is the possession, &c., of the younger brother, or other relation of an heir, to be considered the possession, &c., of such heir (*u*). It should be observed that, where two persons enter wrongfully, they, being disseisors, enter as joint tenants (*v*); and, therefore, where two persons by adverse possession for the statutory period acquire a title under the Statute, they do so as joint tenants (*y*).

Estates in remainder, &c. when time begins to run against.

The right of a remainderman, reversioner, or executory devisee (*z*), accrues when his estate falls into possession (*a*): and this, although he may have waived a previous forfeiture (*b*), or granted a concurrent lease whereby there has been a surrender of the old lease by estoppel (*c*), and although, in the case of a reversioner, he, or the person through whom he claims, may have been in possession previously to the creation of the particular estate (*d*): but

(*r*) Sect. 35.

(*s*) *Doe* v. *Hindi*, 2 Mo. & R. 441; *Doe* v. *Benham*, 7 Q. B. 976, 978.

(*t*) Sect. 12; *Burroughs* v. *M'Creight*, 1 J. & L. 290, this clause is retrospective: see *Culley* v. *Doe*, 11 A. & E. 1008; *Doe* v. *Horrocks*, 1 C. & K. 566; *Doe* v. *Woodbridge*, 2 H. L. C. 811, 833.

(*u*) Sect. 13.

(*v*) Co. Litt. 181 a.

(*y*) *Ward* v. *Ward*, 6 Ch. 789; *Bolling* v. *Holiday*, 31 W. R. 9.

(*z*) See *James* v. *Salter*, 3 Bing. N. C. 544, 554.

(*a*) Sect. 3; see *Doe* v. *Edmonds*, 6 M. & W. 295; *Duke of Leeds* v. *Earl Amherst*, 2 Ph. 125.

(*b*) Sect. 4; this section includes a breach of condition, and is to be construed liberally; *Astley* v. *Earl of Essex*, 18 Eq. 390.

(*c*) *C. C. C. Oxford* v. *Rogers*, 49 L. J. C. L. 4.

(*d*) Sect 5; and see *Doe* v. *Edmonds*, 6 M. & W. 295; *Re Birmingham's Estate*, 5 I. R. Eq. 147. This section has been repealed and re-enacted by sect. 2 of the Act of 1874, the main difference being as to time.

where the same person who is entitled to the particular estate is also entitled to the immediate beneficial reversion, time will run against both estates even although there may be no merger (*e*). Where rent amounting to 20*s.* *per annum* or upwards, reserved by a lease in writing, is received by a wrongful claimant, no fresh right accrues to the reversioner upon the determination of the lease (*f*); and the title to the reversion is in effect transferred to the wrongful recipient of the rent: but, in order to bar the rightful reversioner, there must be actual receipt of the rent by a wrongful claimant; its mere retention by the tenant is immaterial (*g*). The existence of a lease containing general words sufficient to comprise the property in question, but which was not intended to comprise it, and has not been acted on as respects such property, would not, it appears, prevent the Statute from running (*h*): and where the right of a person to an estate in possession is barred, the right of such person, and of all parties claiming under him, to any future estate, is also barred, unless the land or rent is in the meantime recovered by some person claiming in right of some intervening estate (*i*). Where there was a limitation to husband and wife for their joint lives, with remainder to the heirs of the husband, who became bankrupt, the last limitation was held to be a future estate within the meaning of this section:

Lease in writing.

The right of the remainderman must now be asserted either within twelve years from the date at which the right accrued to the person whose prior interest has determined, or within six years from the date at which the estate of the remainderman became vested in possession, whichever period is the shorter. Where the owner of the particular estate dies after conveyance thereof, the alienee, and not his vendor, is "the person last entitled" under the section; *Pedder* v. *Hunt*, 18 Q. B. D. 565.

(*e*) *Doe* v. *Moulsdale*, 16 M. & W. 689.

(*f*) 3 & 4 Will. IV. c. 27, s. 9; this provision is retrospective; see *Doe* v. *Angell*, 9 Q. B. 328; see *ibid.* p. 355, as to the construction of the word "rent" throughout the 9th section; and see *Grant* v. *Ellis*, 9 M. & W. 113. As to what is "rent wrongfully received" within the meaning of this section, see *Shaw* v. *Keighron*, 3 I. R. Eq. 571; *Williams* v. *Pott*, 12 Eq. 149.

(*g*) *Doe* v. *Oxenham*, 7 M. & W. 131; *Chadwick* v. *Broadwood*, 3 B. 308; see, however, *Ex parte Jones*, 4 Y. & C. 466; as to rents of mines reserved *in specie*, see *Denys* v. *Shuckburgh*, 4 Y. & C. 42.

(*h*) See *Dean and Chapter of Ely* v. *Bliss*, 5 B. 574.

(*i*) Sect. 20; and see *Doe* v. *Moulsdale*, 16 M. & W. 689—698.

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and the possession of the land by the surviving wife, although taken without legal proceedings, saved the right of the assignee of the husband (*k*).

Married woman, when barred.

When a married woman and her husband join in a conveyance of her estate by an assurance which, for want of a fine or statutory acknowledgment, is not binding on her, time will begin to run against her and her heirs only from the death of the husband (if tenant by the curtesy); or from her death in his lifetime (if they have no inheritable issue (*l*)): but where there is no conveyance binding on the husband, but a mere abandonment of possession by husband and wife, it has been held that time will run against her from the date of such abandonment (*m*).

Remainders expectant on an estate tail are barred when estate tail is barred.

By the 21st section it is enacted, "That when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person

(*k*) *Doe* v. *Liversedge*, 11 M. & W. 517.

(*l*) *Jumpson* v. *Pitchers*, 13 Si. 327; see Sug. 183; *Neesom* v. *Clarkson*, 2 Ha. 163.

(*m*) *Doe* v. *Bramston*, 3 A. & E. 63. It has been held in Ireland that the mere omission to work unopened mines or quarries reserved to the grantor of the surface, is not an abandonment of possession; and that, in order that the statute may operate, there must be both dereliction by the person who has the right and actual possession, whether adverse or not, to be protected; *M'Donnell* v. *M'Kinty*, 10 Ir. L. R. 514, 526; cf. *Smith* v. *Lloyd*, 9 Ex. 572; *Earl of Dartmouth* v. *Spittle*, 19 W. R. 444. But the case is different where a quarry has ceased to be used, and has been allowed to be filled up, and has thus been under cultivation for over twenty years; *Smith* v. *Stocks*, 58 L. J. Q. B. 306; and see *Kryse* v. *Powell*, 2 E. & B. 132; *Tottenham* v. *Byrne*, 12 Ir. C. L. R. 576; Sug. R. P. 33; and see *Seddon* v. *Smith*, 36 L. T. 168, where a person was held by twenty years' user of the surface to have acquired a title, as against the lord, to the minerals also; and see, too, *Low Moor Co.* v. *Stanley Coal Co.*, 34 L. T. 186, where there was a demise of several seams of coal, and a working of two seams, and it was held that the working was so carried on as to have given possession of the whole under the statute. But compare *Ashton* v. *Stock*, 6 Ch. D. 719.

Time runs against the estate tail and the remainders.

claiming any estate, interest, or right which such tenant in tail might lawfully have barred" (*n*): and the 22nd section, in effect, provides that time which has commenced running against a deceased tenant in tail, shall be counted as against persons claiming in respect of any estate, &c., which he "might lawfully have barred." These sections are retrospective: and when time has begun to run against the tenant in tail, the remainderman has no extended time allowed by reason of his being under disability, when his estate falls into possession (*o*). But when the tenant in tail, instead of being dispossessed, or allowing another person to usurp possession, purports to convey the estate by an assurance, which, although voidable by the issue in tail, is binding on himself personally during his life, the issue has the full statutory period from his death in which to claim the estate (*p*).

But tenant in tail must have been *sui juris*, *semble*.

The expression in each of these two sections "might lawfully have barred," seems to require personal legal capacity on the part of the tenant in tail to bar the remainders: from which this singular result would seem to follow; *viz.*, suppose the right of a tenant in tail to accrue in possession when he is one year old, and that he attains twenty-one, and dies the next day under no personal incapacity, the Statute would run against remaindermen as from the time when his right first accrued: but suppose him to die just before attaining twenty-one, or to attain twenty-one an idiot or lunatic, and so to continue until his death, in such a case it would seem that remaindermen would be in no way affected by the above sections of the Act. This construction, if it be a correct one, must, in many cases where land has been

(*n*) See *Austen* v. *Llewellyn*, 9 Ex. 276. Where the right of entry by a tenant in tail was by a special Act unable to be barred, it was held that his right to eject a person, who had held over for forty years after the expiration of the lease, was not barred either by sect. 2 or sect. 21 of the 3 & 4 Will. IV. c. 27; *Earl of Aberyaveny* v. *Brace*, L. R. 7 Ex. 145.

(*o*) *Goodall* v. *Skerratt*, 3 Dr. 216.

(*p*) *Cannon* v. *Remington*, 12 C. B. 1; but see report of *Goodall* v. *Skerratt*, in 1 Jur. N. S. 57.

brought into settlement, materially interfere with the beneficial operation of the Statute upon titles.

Base fee—when to become a fee simple.

The 23rd section, which has been repealed (*q*), and re-enacted by the Act of 1874, with the substitution of twelve for twenty years (*r*), has been a good deal discussed in the profession. According to Lord St. Leonards its effect is, "that where a tenant in tail executes a deed enrolled under the 3 & 4 Will. IV. c. 74, which, for want of the consent of the protector, operates only to create a base fee, under which possession is obtained, the title will become good against those in remainder at the end of twenty years from the period when the tenant in tail, or his issue, could, without the consent of any third person, have barred the remainders over under the 3 & 4 Will. IV. c. 74; but this operation will not be effected, if the assurance already executed would not, if then executed without consent, have operated to bar the estates in remainder" (*s*). It would seem that the section, which applies only to assurances which are effectual to bar the entail (*t*), has not a retrospective operation (*u*).

Here it may be observed, the same question arises as to the necessity for personal legal capacity on the part of the tenant in tail or his issue to execute a disentailing conveyance, as well as the non-existence of a protector, at the time when the Statute is to begin to run.

And in the opinion of Lord St. Leonards base fees which were created before the passing of the 3 & 4 Will. IV. c. 27, are, as a general rule, at any rate where the remainder had been discontinued and turned into a right, rendered unassailable by the 36th section of the Act (*v*).

(*q*) 37 & 38 V. c. 57, s. 9.

(*r*) *Ibid.* s. 6.

(*s*) Sug. 183, 184.

(*t*) *Morgan* v. *Morgan*, 10 Eq. 99; *Mills* v. *Capel*, 20 Eq. 602.

(*u*) See *Penny* v. *Allen*, 7 D. M. & G. 409; and 1 Jarm. Conv. 32.

(*v*) Sug. 184. The effect of this section, which abolishes real actions, is to bring into exercise the lower remedy in the shape of an action for debt for a rent-charge in fee, created by deed, or for a tithe rent-charge created by statute, where formerly

Equity of redemption, when to be barred.

Acknowledgment.

The right of a mortgagor to redeem (*x*), is to be barred at the end of twelve years from the mortgagee taking possession, or last giving a written acknowledgment of title. The acknowledgment must be given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person (*y*); and the 28th section of the earlier Act was held to be retrospective; so that where, before that Act, a mortgage had been twice transferred, as such, by deeds to which the mortgagor was no party, and no acknowledgment of the equity of redemption had been given to him for seventeen years before the passing of the Act, these years were counted against him upon his subsequently filing a bill to redeem (*z*). An acknowledgment given to one of several mortgagors, or representatives of a mortgagor, operates in favour of all: but an acknowledgment by one of several mortgagees, or representatives of a mortgagee, does not affect the proportionate interests of the others (*a*). If a mortgagee while in possession is himself entitled to such possession in respect of a life or other limited interest in, or as a tenant in common of, the equity of redemption, the period for which he is so entitled will not be counted against the parties entitled in remainder, or together with him, to the equity of redemption (*b*). Possession of any of the land comprised in the mortgage is sufficient to make time run against the mortgagor: and the old law that possession of any part by the mortgagor would prevent time running is abolished by this section (*c*). Where the mortgagor's right to redeem is extinguished, the trust of surplus proceeds of a sale to be made under the power of sale is also extinguished: and the

If mortgagee is entitled to possession, as being interested in equity of redemption, time does not run.

a writ of assize of novel disseisin would have been good, *Thomas* v. *Sylvester*, L. R. 8 Q. B. 368; *Christie* v. *Barker*, 53 L. J. Q. B. 537; and see *Varley* v. *Leigh*, 2 Ex. 416.

(*x*) 37 & 38 V. c. 57, s. 7, which was substituted for sect. 28 of 3 & 4 Will. IV. c. 27, repealed by sect. 9 of the later Act. *Broune* v. *Bishop of Cork*, 1 D. & Wal. 700.

(*y*) *Markwick* v. *Hardingham*, 15 Ch. D. 339, 352.

(*z*) *Batchelor* v. *Middleton*, 6 Ha. 75. Cf. *Forsyth* v. *Bristow*, 8 Ex. 716, a case under the 40th section.

(*a*) Sect. 28; and see *Richardson* v. *Younge*, 10 Eq. 275.

(*b*) *Rafferty* v. *King*, 1 Ke. 601; *Tull* v. *Owen*, 4 Y. & C. 201; *Hyde* v. *Dallaway*, 2 Ha. 528; *Hyam* v. *Styan*, 2 Ph. 303; *Broune* v. *Bishop of Cork*, 1 D. & Wal. 711.

(*c*) *Kinsman* v. *Rouse*, 17 Ch. D. 104.

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trust does not attach upon a sale, made subsequently to the bar of the equity of redemption (*d*).

Extinguished right to redeem cannot be revived by acknowledgment.

In former editions of this work doubts were expressed as to the correctness of the decisions which laid down that the mortgagor's title to redeem, though bound, and under the 34th section of the earlier Act, "extinguished," by twenty years' adverse possession by the mortgagee, might be revived by a subsequent acknowledgment (*e*). The decisions in question have been overruled: and it is now settled that a title, once barred, cannot be revived by a subsequent acknowledgment (*f*). Nor, after the statutory period has expired, can the owner who is barred adopt the acts of a stranger as the acts of his agent (*ff*).

Time allowed for action, &c., by spiritual or eleemosynary corporation sole.

No spiritual or eleemosynary corporation sole is to recover any land or rents but within two successive incumbencies and six years, or sixty years, (whichever be the longer period,) from the time when the right accrued (*g*). It has been held by the House of Lords that this section applies to a case where the lands of such a corporation have become vested in the Ecclesiastical Commissioners (*h*); but this depended on the wording of the special Act; and the section does not apply to an ordinary lay successor of such a corporation (*i*).

For recovery of advowson or right of presentation.

No advowson is to be recovered, or right of presentation enforced, but within three successive adverse incumbencies or sixty years (whichever be the longer period), reckoning therein incumbencies by lapse but not incumbencies after promotions to bishoprics (*j*); and a patron claiming in respect

(*d*) *Chapman* v. *Corpe*, 27 W. R. 781.

(*e*) *Stansfield* v. *Hobson*, 3 D. M. & G. 620; see *Thompson* v. *Bruger*, 9 Jur. N. S. 863.

(*f*) *Re Alison*, 11 Ch. D. 284; *Sanders* v. *Sanders*, 19 Ch. D. 373. And the fact that a mortgagee, whose security is in the form of a trust to sell, sells after twenty years' possession under his power, instead of as owner in fee under the statute, will not alter his rights, or make him trustee of the surplus for the mortgagor. *Re Alison*, *supra*.

(*ff*) *Lyell* v. *Kennedy*, 18 Q. B. D. 796.

(*g*) Sect. 29; *Archbishop of Dublin* v. *Coote*, 12 Ir. Eq. R. 251.

(*h*) *Ecclesiastical Commrs.* v. *Rowe*, 5 Ap. Ca. 736.

(*i*) *Irish Land Commission* v. *Grant*, 10 Ap. Ca. 14.

(*j*) Sects. 30 & 31; see *Robinson* v. *Marquis of Bristol*, 20 L. J. C. P. 208; see as to Ireland, 6 & 7 V. c. 54, and 7 & 8 V. c. 27.

of an estate in remainder on an estate tail, is, for the purposes of the statutory bar, to be considered as claiming through the person entitled to such estate tail (*k*). Successive adverse incumbencies extending over one hundred years form an absolute bar, unless the benefice has been since enjoyed under a rightful presentation; and in calculating this period, a presentation adverse to the owner of a particular estate is considered adverse to remaindermen (*l*).

For recovery of money charged on land.

No money secured by any mortgage, judgment (*ll*), or lien, or otherwise charged upon or payable out of any land or rent, nor any legacy, is to be recovered but within twelve (under the earlier Act twenty) years next after a present right to receive the same shall have accrued to some person, capable of giving a discharge for or release of the same; unless there has been some intermediate payment by the person liable to pay (*m*) in respect of principal or interest, or acknowledgment of right given in writing: in which case the statutory period is to run from the date of such payment or acknowledgment (*n*).

Time to be excluded.

From the above period must be excluded the time (if any) during which the person entitled to the charge has been also entitled to the possession of the land or rent; or during which the rents of the estate charged have been exhausted by prior incumbrancers (*o*): and where a term was vested in trustees, in trust to raise portions for younger children, and, subject thereto, the estate was limited in strict settlement, it was held by Lord Lyndhurst that the possession of the estate by the parties in reversion was consistent with the trust, and that the statutory bar did not apply (*p*). So, also, in

(*k*) Sect. 32.

(*l*) Sect. 33.

(*ll*) Execution cannot be issued upon a judgment upon which no payment has been made for twelve years in respect of principal or interest; *Evans* v. *O'Donnell*, 18 L. R. Ir. 170.

(*m*) *Harlock* v. *Ashberry*, 19 Ch. D. 539; *Neubould* v. *Smith*, 29 Ch. D. 882; 33 Ch. D. 127.

(*n*) 37 & 38 V. c. 57, s. 8. A foreclosure action is an action for the recovery of land, and is therefore not within this section. *Wilson* v. *Fire*, 3 D. & War. 101, *Pugh* v. *Heath*, 7 Ap. Ca. 235.

(*o*) *Knight* v. *Bowyer*, 23 B. 635.

(*p*) *Young* v. *Lord Waterpark*, 13 Sim. 204; 10 Jur. 1.

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the case of a term in trust to raise annuities (*q*): so, where an outstanding term is assigned in trust for a mortgagee (*r*): so, legatees, whose legacies are charged on land, are not to be affected by lapse of time, while any prior charge is subsisting (*s*): so, where a legacy given upon certain trusts has been severed from the general estate, time does not run against the legatee under this section, although the fund may remain in the hands of the executor (*t*): so, where a trust fund was inadvertently paid by the trustee to a person not entitled to it, the Statute was held to be no bar to the rightful claimant (*u*): so, where a mortgagee is also tenant for life of the mortgaged estate, time does not run against the mortgage title until his death (*x*): and the same rule applies where he is tenant in common with others of the mortgaged estate (*y*).

What cases fall within the 40th section.

The 40th section, which has been repealed by section 9, but re-enacted, with the substitution of twelve years for twenty, by section 8 of the Real Property Limitation Act (*z*), has reference not to the land itself, but to actions for the recovery of money, as, *e.g.*, a mortgage debt secured by covenant, or collateral bond (*a*); and a judgment debt is "money payable out of land" within the meaning of the section (*b*): so, also, a vendor's lien for unpaid purchase-money (*c*); but whether the produce of real estate directed to be sold is "money payable out of land," has been doubted (*d*). It is now, how-

(*q*) *Cox* v. *Dolman*, 2 D. M. & G. 592; and see *Price* v. *Lytle*, 1 Dr. 396, *Scott* v. *Scott*, 18 Jur. 775, *Lee* v. *Nash*, 20 L. T. O. S. 123, *Smith* v. *Booth*, 8 D. M. & G. 69; *Lewis* v. *Dunbarbe*, 7 Jur. N. S. 695; *R. Berringham's Estate*, 5 I. R. Eq. 147.

(*r*) *Shaw* v. *Johnson*, 7 Jur. N. S. 1065, and see *O'Hara's Tourist*, 6 W. R. 45; and *supra* as to *express* trusts.

(*s*) *Faulkner* v. *Daniel*, 3 Ha. 212.

(*t*) *Phillips* v. *Munnings*, 2 M. & C. 309; *Roch* v. *Callen*, 6 Ha. 536; *Dillon* v. *Cruise*, 3 Ir. Eq. R. 70; *Bullock* v. *Downes*, 9 H. L. C. 1.

(*u*) *Harris* v. *Harris*, 29 B. 110.

(*x*) *Spickernell* v. *Hotham*, Kay, 609.

(*y*) *Wynne* v. *Stone*, 2 Ph. 303, and *vide ante*, p. 451.

(*z*) 37 & 38 V. c. 57.

(*a*) *Dee* v. *Williams*, 5 A. & E. 296; *Sheppard* v. *Duke*, 9 Si. 567.

(*b*) *Henry* v. *Smith*, 2 D. & War. 381; *Berrington* v. *Evans*, 1 Y. & C. 434, *Watson* v. *Birch*, 15 Si. 523.

(*c*) *Toft* v. *Stephenson*, 7 Ha. 1; 1 D. M. & G. 28; 5 D. M. & G. 735.

(*d*) *Pansey* v. *Barnes*, 20 L. J. Ch. 393; but see *Bowyer* v. *Woodman*, 3 Eq. 313, where the produce of real estate directed to be sold was held to be money payable out of land within

ever, settled that section 8 of the new Act has reference to the personal covenant in a mortgage deed as well as to the remedy against the land (*e*). Money due on a bond executed by an ancestor (*f*), and turnpike tolls (*g*), do not fall under the Act; but the section applies to any legacy, whether payable out of real or personal estate (*h*); and a share of residue is a "legacy" within the section (*i*). By the 23 & 24 Vict. c. 38 (*k*), the operation of this section is extended to claims upon the personal estates of intestates.

What suits are considered to be such within the Act.

A foreclosure action for the recovery of "money charged upon land," is not within the 40th section, but is within the 24th section (*l*): a vendor's suit for the recovery of his unpaid purchase-money has been held to be within the 40th section (*m*); but a suit for the recovery of a legacy held on certain trusts, which has been severed from the general estate, although retained by the executor, is a suit for the administration of the trust fund, and this section affords no statutory bar (*n*). And it seems probable that the statutory bar does not apply, where the bill was filed before, though no decree was made until after, the passing of the Act (*o*).

What is sufficient payment.

Payment by any person authorized to make it, but not by

the 42nd section; *Pawsey* v. *Barnes* does not appear to have been cited. And cf. *Mutlow* v. *Bigg*, 18 Eq. 246; 1 Ch. D. 385; *ante*, p. 439.

(*e*) *Sutton* v. *Sutton*, 22 Ch. D. 511; *Fearnside* v. *Flint*, *ibid.* 579; and see and distinguish *Re Powers*, 39 Ch. D. 291. The word land, in the section, means land within the jurisdiction only; *Sutton* v. *Sutton*, W. N. 1883, p. 88.

(*f*) *Roddam* v. *Morley*, 1 D. & J. 1.

(*g*) *Mellish* v. *Brooks*, 3 B. 22; *aliter* as to quarries, &c.; *M'Donnell* v. *M'Kinty*, 10 Ir. L. R. 521, and *ante*, p. 448.

(*h*) *Sheppard* v. *Duke*, 6 Si. 567.

(*i*) *Christian* v. *Devereux*, 12 Si. 264; *Sheppard* v. *Duke*, 6 Si. 567; *Prior* v. *Horniblow*, 2 Y. & C. 200.

(*k*) Sect. 13. The section is retrospective; *Willis* v. *Earl Howe*, 50 L. J. Ch. 4; *Re Johnson*, 29 Ch. D. 964.

(*l*) *Pugh* v. *Heath*, 7 Ap. Ca. 235; *Hurlock* v. *Ashberry*, 19 Ch. D. 539; and see *Wrixon* v. *Vize*, 3 D. & War. 104; Sug. R. P. 117. A simple foreclosure action is not an action for the recovery of possession of land within O. 42, R. 5 of R. S. C. 1883; and it is prudent in such an action to add a claim for possession; *Wood* v. *Wheater*, 22 Ch. D. 281.

(*m*) *Toft* v. *Stephenson*, 1 D. M. & G. 28; 5 D. M. & G. 735.

(*n*) *Phillips* v. *Mannings*, 2 M. & C. 309; *Bullock* v. *Downes*, 9 H. L. C. 1; *Harcourt* v. *White*, 28 B. 303; see and consider *Edmunds* v. *Waugh*, 1 Eq. 418; and *Tyson* v. *Jackson*, 30 B. 384, where the executor constituted himself an express trustee of the legacy.

(*o*) *Ravenscroft* v. *Freeby*, 1 Coll. 16

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a mere stranger, is sufficient to bring the case within this section (*p*): so is payment by the parties claiming the land, or their trustees (*q*): but there must be a proper hand to receive, and give a discharge for the money paid (*r*); and if, though the persons to pay and to receive are different, they are yet trustees for one and the same person, the statute does not run (*rr*); and where the person liable to pay is also the person entitled to receive, no question of limitation under the Statute can arise (*s*). A payment to come within 1 Vict. c. 28, must be a payment of principal or interest, and must be made by the mortgagor or some person "who is entitled under the terms of the contract to make a tender, and from whom the mortgagee is bound to accept a tender, of money for the defeazance or redemption of the mortgage" (*ss*); and hence a payment of rent made by a tenant of the mortgaged property is not such a payment (*t*). Payment of interest by a devisee for life on his testator's specialty debt is sufficient as against the remainderman (*u*). But where there

(*p*) *Homan* v. *Andrews*, 1 Ir. Ch. R. 106. A payment of a part of a debt due from a firm by one partner, after the dissolution of the firm, is not sufficient to bind the other partner, so as to prevent time from running under the statute; *Watson* v. *Woodman*, 20 Eq. 721; and see generally on the principle *Hardoll* v. *Ashberry*, 19 Ch. D. at p. 515.

(*q*) *Tuft* v. *Stephenson*, 1 D. M. & G. 10; 5 D. M. & G. 735.

(*r*) *M'Carthy* v. *Dunnt*, 11 Ir. Eq. R. 29; and see as to payment by a person filling a double character, *Fordham* v. *Wallis*, 10 Ha. 217. As to executors paying over assets to beneficiaries, see *Thorne* v. *Kerr*, 2 K. & J. 54; *Re Gath*, 22 Ch. D. 820; *Blake* v. *Gale*, 32 Ch. D. 571; but see *Re Marsden*, 26 Ch. D. 783.

(*rr*) *Topham* v. *Booth*, 35 Ch. D. 607.

(*s*) *Binns* v. *Nicholls*, 2 Eq. 256; *Seagram* v. *Knight*, 2 Ch. 628; *Burrell* v. *Earl of Egremont*, 7 B. 205.

(*ss*) *Lewin* v. *Wilson*, 11 Ap. Ca. 639, 646; and it would seem that the same should be the rule with regard to payments under sect. 8 of the Act of 1874, the legislature having used stricter language as to the persons who may give an effectual acknowledgment than as to those who may make payment; *ibid.*

(*t*) *Hardoll* v. *Ashberry*, 19 Ch. D. 539; and see *Newbold* v. *Smith*, 33 Ch. D. 127.

(*u*) *Roddam* v. *Morley*, 1 D. & J. 1; see *Cooper* v. *Cresswell*, 2 Ch. 112, 126; in which the ultimate decision in *Roddam* v. *Morley* was questioned by Lord Chelmsford; but in *Pears* v. *Laing*, 12 Eq. 41, it was expressly approved and followed, notwithstanding the adverse comments upon it in *Cooper* v. *Cresswell*, and must now be regarded as well settled law. In *Dickinson* v. *Teasdale*, 1 D. J. & S. 52, acknowledgment by one of several devisees subject to a charge was held sufficient to bind the others; but in *Richardson* v. *Younge*, 6 Ch. 478, acknowledgment by one of two mortgagees, who on the face of the

was an actual charge, and the tenant for life, without the consent or knowledge of the tenant in tail in remainder, paid to the person, who but for the Statute would have been entitled, the amount of the charge with six years' arrears of interest, the tenant in tail was held not to be bound by the transaction, and the charge was barred (*e*): so, payment of interest on an Irish mortgage made by a receiver of the mortgaged estates, appointed under the Irish Mortgage Act, 11 & 12 Geo. III. c. 10, has been held to be payment by an agent within this section (*y*); so, also, payment of interest by a dowress in possession of the mortgaged estate, with the consent of the heir of the mortgagor (*z*). Where A. and B. gave a bond to C., and at the same time each mortgaged some property to C. as a collateral security, although as between A. and B. the latter was only a surety; A. for nineteen years duly paid interest on the debt; two years later, on C. desiring to foreclose A. and B., it was held that, although B. had never paid any interest, yet A.'s payments had prevented time from running in favour of B. (*zz*). It would seem that, in order to constitute a sufficient payment, it is not essential that money should actually pass between the parties; thus, where a debtor put his hand into his pocket, as if for the purpose of paying the interest due, and the creditor anticipated actual payment by handing him a written receipt for it, this was held to be a sufficient payment (*a*): but where A. being indebted to B. on three several debts, two of which were barred by the Statute, made a payment of interest at B.'s request, without referring to any of the debts, the payment was treated as exclusively made in respect of the unbarred debt; and not as an acknowledgment of the debts which were already barred (*b*).

deed appeared to be trustees of the mortgage debt was held insufficient to keep alive the right of redemption; and *vide ante*, p. 451.

(*x*) *Becher* v. *Delacour*, 11 L. R. Ir. 187.

(*y*) *Chunnery* v. *Evans*, 11 H. L. C. 115.

(*z*) *Ames* v. *Manwering*, 26 B. 583.

(*zz*) *Lewin* v. *Wilson*, 11 App. Ca. 639.

(*a*) *Maber* v. *Maber*, L. R. 2 Ex. 153, *diss.* Bramwell, B.

(*b*) *Nash* v. *Hodgson*, 6 D. M. & G. 474; but *quere* if the interest paid had been more than was due on the unbarred debt, would not the payment have been an acknowledgment of the other debts? See also *Spickernell* v. *Hotham*, Kay, 669.

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Acknowledgment what is sufficient under sects. 40 and 42.

The acknowledgment referred to in the 40th and 42nd sections of the earlier Act and the 8th of the Act of 1874, must be in writing; but may be signed by the agent of the person giving it (c): and the Courts, in determining what is a sufficient acknowledgment under these sections, have adopted a liberal construction of the language of the Act (d); thus, an affidavit, or answer, though made under compulsion may be a sufficient acknowledgment of a debt or claim (e): but not the report of the Master under the former practice, nor, it is conceived, the Chief Clerk's certificate under the present practice in a suit (f). An admission in the will of the debtor of the existence of a judgment debt has been held a sufficient acknowledgment (g); so, any admission in writing by the debtor, of the existence of an unsettled account, either with or without a promise to pay the balance (if any) due, will prevent the Statute running (h): so, also, his written promise to pay so soon as he is able (i): so, a letter by the solicitor of the purchaser's devisees to the solicitor of the vendor's assignees that the purchase-money was lying idle, was held to be a sufficient acknowledgment of the existence of the vendor's lien (k): but where there is no absolute admission that anything is due, but simply an agreement to refer a disputed account to arbitration, and no award is made, there is no sufficient acknowledgment to take the case out of the Statute (l). So, a letter admitting the existence of the debt, but stating the debtor's inability to pay in full, and proposing a composition, has been held insufficient (m); so,

(c) *Alter* under sect. 11 and 28, *ante*, p. 115.

(d) See *Blair* v. *Nugent*, 3 J. & L. 673.

(e) *Goode* v. *Job*, 5 Jur. N. S. 145; *Moodie* v. *Bannister*, ib. 402, *Trustrook* v. *Harte*, Long. & T. 186, and see also *Vincent* v. *Wallington*, ib. 156, *Burrowes* v. *Gore*, 6 H. L. C. 909.

(f) *Hill* v. *Stawell*, 2 Jebb & S. 389.

(g) *Millington* v. *Thompson*, 3 Ir. Ch. R. 236.

(h) *Prance* v. *Sympson*, Kay, 678; *Banner* v. *Berridge*, 18 Ch. D. 254; *Re River Steam Co.*, *Mitchell's claim*, 6 Ch. 822, *Cowper* v. *Turner*, L. R. 10 Q. B. 500, *Quincey* v. *Sharpe*, 1 Ex. D. 72, *Sheet* v. *Lindsay*, 2 Ex. D. 314, *Green* v. *Humphreys*, 26 Ch. D. 474, *Ingram* v. *Little*, 1 C. & E. 186.

(i) *Hammond* v. *Smith*, 33 B. 452.

(k) *Toft* v. *Stephenson*, 1 D. M. & G. 28; S. C., 5 D. M. & G. 735.

(l) *Hales* v. *Stevenson*, 9 Jur. N. S. 300; but see *Cheslyn* v. *Dalby*, 4 Y. & C. 238.

(m) *Everett* v. *Robinson*, 4 Jur. N. S. 1083; and cases cited.

also, a letter by the debtor disclaiming an intention to avail himself of the Statute, but professing his inability to pay, and soliciting further indulgence (*n*). Where money was lent to a trader to accumulate for the creditor's benefit at compound interest, it was held that the Statute began to run at the date of the advance; and that periodical entries in the debtor's books, carrying over interest to the creditor's account, did not take the case out of the Statute (*o*).

Arrears of dower.

No arrears of dower are to be recoverable for more than six years (*p*); and no exception is made of cases where an acknowledgment of title has been given.

Arrears of rent.

No arrears of rent (*q*) (which includes a fee-farm rent (*r*),) and tithe rent-charge (*s*), or of interest in respect of any sum of money charged upon or payable out (*t*) of any land or rent, or in respect of any legacy, are to be recoverable for more than six years (*u*) from the time when they became due, or when a written acknowledgment (*x*) of the same was last given, unless a prior incumbrancer has been in possession within one year before the commencement of the proceedings for the recovery of such arrears, in which case they may be recovered for the whole period of such possession (*y*); that is, if the prior incumbrance affect the estate or interest upon which the subsequent incumbrance is a charge (*z*). Where there are several incumbrancers on the

(*n*) *Rackham* v. *Marriott*, 3 Jur. N. S. 495; and cf. *Green* v. *Humphreys*, *suprà*.

(*o*) *Jackson* v. *Ogg*, John. 976.

(*p*) Sect. 41; *Bamford* v. *Bamford*, 5 Ha. 203.

(*q*) Sect. 42, see *Hickman* v. *Upsall*, 4 Ch. D 144.

(*r*) *Humfrey* v. *Gery*, 7 C. B. 567.

(*s*) *Ecclesiastical Commissioners* v. *Lord Sligo*, 5 Ir. Ch. R. 46.

(*t*) Including judgments, *Henry* v. *Smith*, 2 D. & War. 381; and see *Burne* v. *Robinson*, 1 D. & Wal. 688. A new right has been held in Ireland to accrue on a judgment being revived on a *sci. fa.*, see *R. Blake*, 2 Ir. Ch. R. 643. A share of the proceeds of sale of real estate directed to be sold has been held to be money payable out of land within this section, *Bowyer* v. *Woodman*, 3 Eq. 313, and *vide ante*, p. 155, and cases cited in note (*d*).

(*u*) Time is reckoned from the filing of the bill, *Chappell* v. *Rees*, 1 D. M. & G. 393.

(*x*) Return in insolvent's schedule held sufficient, *Barrett* v. *Birmingham*, Fl. & K. 556; but see *Hobson* v. *Burns*, 13 Ir. L. R. 286.

(*y*) Sect. 42, *Francis* v. *Grover*, 5 Ha. 39; *Drought* v. *Jones*, 2 Ir. Eq. R. 303.

(*z*) *Vincent* v. *Godog*, 1 J. & L. 697.

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same land, ranking in a series one after the other, payment or acknowledgment by the mortgagor will not keep alive the right of the first mortgagee to arrears of interest beyond the period of six years as against the subsequent mortgagees (*a*). It was held by Sir J. Wigram, V.-C., that if the interest on a mortgage debt is secured by bond or covenant, arrears for twenty years can be recovered as against the mortgaged estate (*b*); but this decision, which was opposed to the opinion of Lord St. Leonards (*c*), has been overruled (*d*); even in a case where the mortgaged estate was a reversion (*e*). It was formerly law, that as against the mortgaged estate the mortgagee could only recover six years' arrears of interest, and must look to the bond or covenant of the mortgagor for the recovery of any further arrears (*f*). But now, no more than six years' arrears can be recovered either against the land or on the covenant (*g*), nor even upon a collateral bond given by the mortgagor simultaneously with the mortgage (*h*). This section, however, does not bar the right to recover arrears of any annuity, charged on a reversionary interest in land, so long as the interest continues reversionary (*i*); nor does it, it is conceived, affect the validity of a clause frequently inserted in mortgages of reversions, and sometimes of other property, and which provides for the capitalization of interest in the event of its falling into arrear: and where the proceeds of a mortgaged estate, sold under a power of sale, were paid into Court in a suit for the administration of the mortgagee's estate, a petition by his representatives for the payment out

(*a*) *Bolding* v. *Lane*, 1 D. J. & S. 122.

(*b*) *Du Vigier* v. *Lee*, 2 Ha. 326.

(*c*) *Harrison* v. *Duignan*, 2 D. & War. 295; *Hughes* v. *Kelly*, 3 D. & War. 182, and see *Hodges* v. *Croydon Canal Co.*, 3 B. 86.

(*d*) *Hunter* v. *Nockolds*, 1 M. & G. 640, 653; *Humfrey* v. *Gery*, 7 C. B. 567; *Round* v. *Bell*, 30 B. 121; *Shaw* v. *Johnson*, 1 Dr. & S. 412; *Mason* v. *Broadhurst*, 33 B. 296; see the cases as to mortgages of reversions discussed in *Smith* v. *Hill*, 9 Ch. D. 143.

(*e*) *Sinclair* v. *Jackson*, 17 B. 405.

(*f*) See *Boreyer* v. *Woodman*, 3 Eq. 313; *Clarkson* v. *Henderson*, 11 Ch. D. 318.

(*g*) 37 & 38 V. c. 57, s. 8; *Sutton* v. *Sutton*, 22 Ch. D. 511.

(*h*) *Pearnside* v. *Flint*, 22 Ch. D. 579. As to the liability of sureties who give an independent bond, see *Re Powers*, 30 Ch. D. 291.

(*i*) *Wheeler* v. *Howell*, 3 K. & 198.

of the fund was held not to be a suit for the recovery of arrears of interest within the 42nd section, so as to disentitle them to recover arrears for nearly twenty years (*k*); but this is not so where money has been paid into Court under the Lands Clauses Consolidation Act for the purchase of land, subject to an equitable mortgage by deposit, with a covenant to execute a legal mortgage: in which case only six years' arrears of interest are recoverable (*l*). It has been held, under the Act of 1833, that the heirs of a mortgagor, who for himself and his heirs has covenanted to pay the principal and interest, could not *redeem* except upon payment of the arrears for twenty years, the mortgagee being at liberty to tack the personal liability under the covenant as against the heir; but it was said that it would be otherwise, if the suit were by the mortgagor himself (*m*). So, rent, or a rent-charge, although recoverable against a covenantor for twenty years under 3 & 4 Will. IV. c. 42 (*n*), is recoverable as against the land only for six years (*o*): and a legal rent-charge is wholly lost by non-payment for a period exceeding the statutory limit (*p*). An annuity charged on land comes within the meaning of the word "rent" in the 42nd section, and therefore no more than six years' arrears are recoverable (*q*); but the position of the grantee of such an annuity which has been duly paid, where the grantor has retained possession of the estate without acknowledg-

(*k*) *Edmunds* v. *Waugh*, 1 Eq. 418; *Re Marshfield*, 31 Ch. D. 721; but see and compare *Mason* v. *Broadbent*, 33 B. 296.

(*l*) *Re Steel's Mortgaged Estates*, 2 Ch. D. 713.

(*m*) *Lhen* v. *Norwood*, 5 De G. & S. 210; and see *Sinclair* v. *Jackson*, 17 B. 413.

(*n*) See *Paget* v. *Foley*, 2 Bing. N. C. 679; *Sims* v. *Thomas*, 12 A. & E. 536; *Manning* v. *Phelps*, 10 Ex. 59; *Darley* v. *Tennant*, 53 L. T. 257. And this right is not affected by the Real Property Limitation Act, 1874; *ibid.*; and see *Donegan* v. *Neill*, 16 L. R. Ir. 309.

(*o*) *Hunter* v. *Nockolds*, 1 M. & G. 640; which see as to the combined effect of the two Acts.

(*p*) *James* v. *Salter*, 3 Bing. N. C. 544; *Langton* v. *Langton*, 18 Jur. 928.

(*q*) *Ferguson* v. *Lavington*, 9 Ir. Eq. R. 202; *Francis* v. *Grover*, 5 Ha. 39. It has been held in a recent case by Kay, J., that nothing is recoverable at all, if no proceeding has been taken to recover within twelve years from the time when the right accrued; *Hughes* v. *Coles*, 27 Ch. D. 231; and see *Dower* v. *Dower*, 15 L. R. Ir. 264.

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ment of title, for a period exceeding the statutory limit, seems to be doubtful (r). It has been held that an annuity given out of personalty is not within this section; for though it is a legacy, yet the yearly payments made in respect of it cannot be treated as "interest in respect of a legacy" (s). In the case of a legacy, and of a suit to administer the estate, the legatee has been held entitled to arrears of interest for six years before the date of carrying in his claim before the master (t).

Purchaser compelled to accept title depending on Statute of Limitations.

It is now settled that a purchaser can be compelled to accept a title depending on adverse possession, verified like any other fact (u). The beneficial application of this principle as between vendors and purchasers, is, however, in the case particularly of missing instruments, materially affected by the difficulty which exists of determining the time when the right of action may have accrued to the supposed adverse claimants: for instance, where forty years have elapsed since the death intestate of a former owner seised in fee simple in possession, the Statute may, as a general rule, be safely relied on as against the claim of any latent heir; as his right of action must ordinarily (x) have accrued at the death: but if the intestacy itself be in dispute, and there be reason to apprehend the existence of a will whose contents are unknown,

(r) See *Searle* v. *Colt*, 1 Y. & C. C. C. 26. Payment by executors and trustees in possession has been held binding, as against the *cestui que use*, *Francis* v. *Grover*, 5 Ha. 39, and see *Toft* v. *Stephenson*, 1 D. M. & G. 37.

(s) *In re Ashwell's Will*, John. 112, where thirty-seven years' arrears were recovered against the residuary legatees. But *quære* whether such an annuity is not a series of separate legacies, each subject to a distinct contingency, and as such within the 40th section; and see *Roch* v. *Callen*, 6 Ha. 531.

(t) *Handley* v. *Wood*, 9 Ha. 201.

(u) *Games* v. *Bonnor*, 33 W. R. 64, and see *Scott* v. *Nixon*, 3 D. & War. 388, where the verification was merely by affidavit; but the Court expressly stated that the purchaser might, had he pleased, have insisted on a regular examination of witnesses; see *Kirkwood* v. *Lloyd*, 12 Ir. Eq. R. 585, 598; *Moulton* v. *Edmonds*, 1 D. F. & J. 246.

(x) There is a possible but very rare exception under the old law of inheritance, in the case of an estate descending to a person who is not full heir, and whose title as temporary heir may be subsequently displaced by the birth of a full heir.

here the Statute is evidently a very slight protection; as limitations may have been created under which a right of action may exist for an indefinite period.

Lapse of time may sometimes render a title less safe.

It sometimes happens that lapse of time increases instead of diminishing a known risk attending a title: *e.g.*, where a settlement, by deed or will, duly executed and attested, has created limitations in remainder, some of which are still subsisting, or capable of taking effect, and the invalidity of the settlement, on the ground of personal incapacity on the part of the settlor, or of fraud practised upon him, &c., has been established in proceedings against the party in possession, and, perhaps, other parties, but which are not binding on all the remaindermen: in such a case, inasmuch as lapse of time increases the difficulty of procuring evidence of the facts necessary to invalidate a *primâ facie* valid document, the risk attending the title may for a very long period be said to increase *de die in diem*.

Possession under the Act bars the right, and not the remedy only;

Possession for a time exceeding the statutory limit, not only bars the remedy, but also extinguishes the right of the original owner (*g*). It has been said that the effect of the Act is to make a Parliamentary conveyance of the land to the person in possession, after the statutory period has

(*g*) See sect. 31; *Scott* v. *Nixon*, 3 D. & War. 388; *Burroughs* v. *M'Creight*, 1 J. & L. 290, *Bolling* v. *Hobday*, 31 W. R. 9. A subsequent entry by a person so barred will be merely a trespass, *Regan* v. *Condal*, 21 W. R. 603, nor will a vesting order, vesting the mortgagee's right in his representatives, revive the title of the mortgagee, when it has once been barred, *Hennany* v. *Blanton*, 12 L. J. C. P. 158, and see *Dankins* v. *Lord Penkyn*, 4 Ap. Ca. 51. The possession of a stranger to be so inconsistent with that of the real owner as to cause time to run against the latter need not be such as necessarily to exclude third parties: *e.g.* it need not be accompanied by the erection of fences, *Seddon* v. *Smith*, 36 L. T. 168, and see *Des Barres* v. *Shey*, 29 L. T. 592. It may be observed that the payment of money into Court under sect. 70 of the L. C. C. Act does not interfere with the running of the Statute, but, on the contrary, the person who was in possession, when the company paid the money in, is, though out of actual possession, still to be considered in possession for the purpose of continuing to enjoy the income as it was enjoyed previously to possession being handed over to the company; *Douglas* v. *L. & N. W. R. Co.*, 2 K. & J. 173, 183; *Ex parte Winder*, 6 Ch. D. 696, 703.

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but does not operate as a statutory transfer.

elapsed (z): but though it is true that the possessory owner after the statutory limit has been passed, is placed by the Act in a position analogous to that which he would have occupied if the fee simple had been absolutely conveyed to him, yet his title under the Act is acquired solely by the extinction of the right of the prior rightful owner; not by any statutory transfer of the estate. If the Statute operated as a sort of involuntary alienation of the estate of the rightful owner, the adverse possessor would take it subject to the subsisting charges; and wherever it was in settlement, his interest therein would constantly be varying according to the successive limitations of the settlement; but this is clearly not the operation of the Statute (a). A person who is in possession, but who has not acquired an indefeasible title under the Statute, has, as against everyone but the rightful owner, an interest which may be inherited, devised, or conveyed (b); and though his possession may have lasted only for a year, he may, without further proof of title, maintain ejectment against a person who comes and turns him out (c); in other words, he may as against *strangers*, defend his right of possession until, by force of the Statute, it has ripened into a right of property. It has been held that in order that possession may confer a valid title upon a particular individual, it must have been either by the same person or by several persons claiming one from another (d).

Series of trespassers.

But a series of trespassers who independently of, and in succession to, one another have occupied for the statutory period, although none of them may have himself acquired a valid title, will yet have the effect of barring the rightful owner (e).

(z) Per Parke, B., 14 M. & W. 42; and see Lord St. Leonards' judgment in *Incorporated Society* v. *Richards*, 1 D. & War. 289.

(a) See 1 Hayes, Conv. 268; and an article 11 Jur. N. S. p. 151.

(b) *Doe* v. *Jauncey*, 8 C. & P. 99, 102; *Asher* v. *Whitlock*, L. R. 1 Q. B. 1, 3.

(c) *Doe* v. *Dyeball*, M. & M. 346.

(d) See *Hawkshee* v. *Hawkshee*, 11 Ha. 230; and see *Holmes* v. *Newlands*, 11 A. & E. 44; *Newlands* v. *Holmes*, 3 Q. B. 679; *Doe* v. *Barnard*, 13 Q. B. 945.

(e) Sects. 2 and 31 of 3 & 4 Will. IV. c. 27; and see *Dixon* v. *Gayfere*, 17 B. 421.

But the most difficult question arises on the rights of such trespassers *inter se*. Thus suppose a case where A. takes and holds possession as a trespasser for three years, then goes out voluntarily and is immediately succeeded by B., who remains in possession for seven years; B. then goes out voluntarily and is immediately succeeded by C., who is in possession at the end of the period of twelve years which bars the rightful owner, and extinguishes his title. Does any of the three trespassers, and which of them, acquire a valid title? The authorities supply no certain answer to these questions. In one case (*f*), where the legal estate was outstanding, and the Court was in possession of the equitable estate by a receiver, on a bill filed by the trustee for a declaration of the rights of the various claimants, Romilly, M. R., decreed possession to the heir of the original rightful owner on the ground that, although his right to bring an action was barred and his title extinguished at law, yet, as none of the subsequent trespassers had occupied for the statutory period, the Court being in possession, could hand over that possession to the heir without his having to bring an action. The ground of this decision is, however, of doubtful validity. In another case (*g*) A. enclosed land in 1842, and other adjoining land in 1850, remained in possession until 1860 and then died, having devised the whole to his wife during her widowhood, with remainder to his daughter in fee; the widow in 1861 married B. who went to reside on the property with the mother and daughter; the daughter died in 1863 an infant, and her mother shortly afterwards in the same year. The daughter's heir-at-law brought ejectment against B. who continued to occupy the property; and it was held that he was entitled to recover possession, on the ground that A.'s title, being that of a disseisor, was good as against all the world except the disseisee, and that his daughter taking by devise from him, and her heir, were in a like position, and could bring ejectment against anyone who dispossessed them. The disseisor's title, then, being good as against all the world except the

Dixon v. Gayfere.

Asher v. Whitlock.

Conclusion drawn from the cases.

(*f*) *Dixon* v. *Gayfere*, 17 B. 421

(*g*) *Asher* v. *Whitlock*, L. R. 1 Q. B. 1.

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disseisee (h), it would seem to follow that he has a better title than anyone else, and that he can therefore recover possession from anyone who dispossesses him or takes possession of the land which he has acquired as disseisor, until his own right of action is barred by the lapse of the statutory period from his evacuation of the property; and for this purpose it does not seem to make any difference that he has been out of physical possession, whether voluntarily or involuntarily, for any time short of the statutory period. If this is so, the true answer to the case above propounded is, that, in the case, at all events, of a disseisor strictly so called, when the original rightful owner loses the possession, the disseisor, *i.e.*, the first usurper of it becomes the rightful owner as against all the world except the original owner; and so on in the case of subusurpations; so that the actual occupier at the time of the extinction of the original owner's right does not acquire an indefeasible statutory title, until the rights of all former usurpers (if any) of the possession have in like manner been extinguished.

In a case at law (i) A. devised an estate of which he was only tenant by the curtesy, to trustees upon trust for his daughter R. for life, with remainder to W.; R. entered under the will and acquired a valid title as against the heir; but the Court of Queen's Bench held that, as against W., she was estopped from alleging that A. had no title, and could not convert her limited interest under the will into a fee.

Extinction of rent.

Rent payable out of land is extinguished by its non-payment during the statutory period; and time runs from the last actual receipt (j). But it must be borne in mind that where the ownership of land, subject to a rent, becomes

(h) *Doe* v. *Dyball*, M. & M. 346; *Doe* v. *Barnard*, 13 Q. B. 945.

(i) *Board* v. *Board*, L. R. 9 Q. B. 48; but see *Paine* v. *Jones*, 18 Eq. 320.

(j) *Owen* v. *De Beauvoir*, 16 M. & W. 547; *De Beauvoir* v. *Owen*, 5 Ex. 166; *Lord Chichester* v. *Hall*, 17 L. T. O. S. 121.

severed, payment of such rent by the owner of any portion of the property will prevent the Statute from running in favour of the owners of the residue (*k*). So long as the owner of the rent receives it out of any portion of the land charged with its payment, there is no dispossession to create a bar under the Statute; and he may distrain on any portion of the land, notwithstanding that the owner or occupier of that portion has not paid the rent for more than twenty years (*l*). But the same rule does not apply to the payment of interest upon gross charges; thus, if a testator charges his estate with a sum of money, and devises it in several portions to different devisees, payment of the interest by any one of them will not prevent the Statute running in favour of the others (*m*).

As to cases between lord of a manor and copyholder.

It has been held (*n*) that the Act applies as between the lord of a manor and a person entitled to a copyhold tenement, but who for twenty years has neglected to enforce his claim to be admitted, and has been out of possession; but it by no means follows that the Act would operate conversely, in favour of the quasi-copyholder, so as to convert his tenure to freehold, in the event of his refusing or neglecting to take admittance, and retaining possession for the statutory period without any acknowledgment of the lord's title.

Adverse possession as against the Crown.

The constitutional maxim (*o*)—"*Nullum tempus occurrit regi*"—has been gradually broken in upon, (1) by the Statute 21 Jac. I. c. 2 (*p*), which disabled the Crown from claiming any manors, lands, or hereditaments, except liberties and franchises, under a title accrued sixty or more years before

(*k*) *Archbishop of Dublin* v. *Coote*, 12 Ir. Eq. R. 251, 264.

(*l*) *Woodcock* v. *Titterton*, 12 W. R. 865.

(*m*) *Dickinson* v. *Teesdale*, 1 D. J. & S. 52; cf. *Coape* v. *Cresswell*, 2 Ch. 112, 126; and see *Pears* v. *Laing*, 12 Eq. 41, and *ante*, p. 456, n. (*n*).

(*n*) *Walters* v. *Webb*, 5 Ch. 531.

(*o*) Co. Litt. 119 *a*. note (1), and see generally Shelf. R. P. 110 *et seq.*

(*p*) See as to practice in Crown suits, 21 Jac. I. c. 14; *Doe* v. *Morris*, 2 Bing. N. C. 189; *A.-G.* v. *Parsons*, 2 M. & W. 23; and see 28 & 29 V. c. 104, s. 52.

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the then session of parliament; and (2) by the Statute 9 Geo. III. c. 16 (*q*), amended by 24 & 25 Vict. c. 62 (*r*), which created a limitation of a permanent kind, by enacting that the king should not sue any persons for any manors, lands, or hereditaments (other than liberties or franchises) on any title which had not accrued within sixty years before the commencement of such suit. The 3 & 4 Will. IV. c. 27, as it does not expressly name the king, does not apply to the Crown (*s*), and does not, therefore, alter the period of limitation as to Crown rights: nor does the 37 & 38 Vict. c. 57. The Act, 2 & 3 Will. IV. c. 71, is, on the contrary, expressed to be binding on the Crown (*t*).

As against lands of the Duchy of Cornwall.

As to title by adverse possession in lands belonging to the Duchy of Cornwall, we may refer to the Acts of 7 & 8 Vict. c. 105; 23 & 24 Vict. c. 53; and 24 & 25 Vict. c. 62, s. 2, which assimilates the limitation applicable to actions and suits by the Crown to actions and suits by the Duke of Cornwall: a title acquired by adverse possession against the Duchy, may, it is conceived, be forced upon a purchaser (*u*).

Remarks on purchases of foreclosed property.

The liability to be re-opened which is incident to a foreclosure, even when absolute (*v*), renders necessary the exercise of considerable caution in purchasing property, the title to which depends on such a decree. The relief is wholly discretionary; and it is impossible to lay down any definite rules as to what circumstances will induce the Court to exercise its discretion; each case must in fact be decided upon its own merits (*y*). The Courts will, however, re-open a foreclosure decree absolute, where there has been any fraud or collusion

(*q*) Extended to Ireland by 48 Geo. III. c. 47, see *Tuthill* v. *Rogers*, 1 J. & L. 36.

(*r*) Sects. 1 and 3. A title acquired by such adverse possession may, it seems, be forced on a purchaser; *Tuthill* v. *Rogers*, *supra*.

(*s*) *Magdalen College Case*, 11 Co. 68 *b*; *Re Cadfield Burial Board*, 19 B. 153, and cases there cited.

(*t*) Sects. 1 and 2.

(*u*) *Tuthill* v. *Rogers*, 1 J. & L. 36.

(*v*) *Thornhill* v. *Manning*, 1 Sk. N. S. 151.

(*y*) *Ibid.*, *Campbell* v. *Holyland*, 7 Ch. D. 166.

in obtaining the decree (z): and generally, where the mortgagor has been taken by surprise, or has been unavoidably absent, and so ignorant of the proceedings (a); or where the debt was of very much smaller amount than the value of the property (b); and indeed, it would seem, in any case of extreme hardship (c). But in all these cases, except that of fraud, it is essential to the obtaining of relief that the mortgagor should take prompt action (d). A purchaser who buys foreclosed property from the mortgagee with notice, actual or constructive, of the existence in the foreclosure proceedings of any of these elements, stands in no better position than the mortgagee (e); and the fact that he contracted to buy the property either before, or immediately after, the foreclosure decree became absolute, is sufficient to disentitle him to any sympathy as against the mortgagor (f). But it may be that a person having notice, may himself obtain a good title by purchasing from a *bonâ fide* purchaser from the mortgagee who had no notice (g).

(z) *Burgh* v. *Langton*, 5 Bro. P. C. 213; *Lloyd* v. *Marshall*, 2 P. W. 73; *Gore* v. *Staples*, 1 Dow, 18; *Harvey* v. *Tebbutt*, 1 J. & W. 197; *Joachim* v. *M'Donell*, 9 Sim. 314, n.; *Abney* v. *Woodsworth*, *ibid.* 317, n.

(a) *Cocker* v. *Bevis*, 1 Ch. Ca. 61.

(b) *Lee* v. *Heath*, 9 Sim. 306, n., *Crompton* v. *Lingham*, *ibid.* 311, n.

(c) *Jones* v. *Cresswell*, 9 Sim. 304; *Naylor* v. *Perkins*, *ibid.* 308, n.; *Joachim* v. *M'Donell*, *supra*; *Campbell* v. *Holyland*, 7 Ch. D. 166, 173.

(d) *Thornhill* v. *Manning*, 1 Sim. N. S. 451.

(e) *Gore* v. *Staples*, 1 Dow, 18; *Campbell* v. *Holyland*, *supra*.

(f) *Campbell* v. *Holyland*, *supra*.

(g) On the principle of *Pascoe* v. *Bird*, 4 L. J. Ch. 33, and *Brandling* v. *Ord*, 1 Atk. 571, but see *West London Bank* v. *Reliance Building Society*, 29 Ch. D. 954, and the remarks of Lindley, L.J., at p. 963.

CHAPTER IX.

AS TO THE PRODUCTION AND EXAMINATION OF THE DEEDS.

1. *As to the place and time for, and expenses of, production of the deeds.*
2. *Production of—may be compelled, by whom.*
3. *Non-production of—how far important.*
4. *Examination of—matters to be observed in.*

Section 1.

As to the place and time for, and expenses of, production of the deeds.

Vendor bound to produce deeds.

(1.) EVERY vendor is presumed to have his title deeds in his own possession, or at any rate to have the power of producing them; and though he may only have a covenant for their production, he is still bound to produce them for the purpose of verifying the abstract (*a*); nor is the rule affected by the Vendor and Purchaser Act, 1874, which merely provides (*b*) that his inability to furnish a legal covenant for production is not to be a ground of objection to the title, or by the Conveyancing Act, 1881, which, while throwing the expense of production to some extent upon the purchaser, does not relieve the vendor from his liability, in the absence of stipulation, to produce the deeds for comparison with the abstract (*c*).

Where to be produced.

The vendor may produce the deeds either at his own known residence (*d*), or upon or in the immediate vicinity of the estate (*e*), or in London (*f*); and the purchaser in such cases pays for the necessary journeys of his own solicitor. If the deeds are in London, a country solicitor must employ a town agent to examine them, and cannot charge for a

(*a*) *Reppingall* v. *Lloyd*, 2 N. & M. 410.

(*b*) 37 & 38 V. c. 78, s. 2.

(*c*) See s. 3 (6) and *Re Johnson and Tustin*, 30 Ch. D. 12.

(*d*) Sug. 429.

(*e*) 1 Jarm. Conv. 99.

(*f*) Sug. 429.

journey for that purpose; unless his client, (knowing the practice of the profession to be the other way,) requests him to undertake it (*g*); but a London solicitor need not employ an agent in a country town to examine deeds, but may send a clerk (*h*). Where all or any of the deeds cannot be produced at one of the usual places for production, the additional expenses of journeys thereby rendered necessary are borne by the vendor (*i*). Whether, however, the purchaser, having voluntarily incurred extraordinary expenses in obtaining an inspection of the deeds, can recover them from the vendor, may be doubted; his proper course, in such a case, is to refuse to go an unreasonable distance unless his extra costs are paid, or guaranteed. In estimating what are such extra costs, the vendor, it is conceived, may set off the travelling expenses which the purchaser would have incurred, if the deeds had been produced upon the estate, or at the vendor's residence, or in London.

At whose expense.

By the Conveyancing Act, 1881 (*k*), on a sale of any property, the expenses of the production and inspection of all documents of title not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all copies or abstracts of or extracts from documents of title not in the vendor's possession, for whatever purpose required, are to be borne by the purchaser. It has been held that this section does not relieve a vendor who has sold under an open contract from the expense of procuring and making an abstract of a deed forming part of the forty years' title, although such deed be not in his possession (*l*).

Notice of place of production.

Where the conditions of sale reserve to the vendor the

(*g*) *Alsop* v. *Lord Oxford*, 1 M. & K. 566; *Horlock* v. *Smith*, 2 M. & C. 523; *In re Tryon*, 7 B. 496.

(*h*) See *Hughes* v. *Wynne*, 8 Sim. 85.

(*i*) S. C., *Sharp* v. *Page*, Sug. 130.

(*k*) See s. 3 (6).

(*l*) *Re Johnson and Tuston*, 30 Ch. D. 42; *Re Moody and Yates*, *ib.* 344.

Deeds covenanted to be produced.

Grants from Crown.

Instruments on record.

option of producing the deeds at any one of several specified places, he must give to the purchaser reasonable notice of the place selected for the purpose (*m*): if he have only a covenant for production, the purchaser may, it seems, require him to produce them; or at least to send his own professional adviser for the purpose of enforcing production: as it might be refused to the purchaser's agent (*n*). In the case of a grant from the Crown, it is sufficient if the vendor's solicitor inform the purchaser where it may be seen (*o*); but the vendor must produce office copies or extracts of proved wills and records, and cannot require the purchaser to examine the originals at the public offices (*p*).

Examination of deeds before investigation of title.

The purchaser may, as we have already seen, examine the deeds before laying the title before counsel; and, if the title prove bad, may, in the absence of any stipulation to the contrary, recover the expenses from the vendor; but, in order to do this, he must prove the existence of a valid contract for sale (*q*); and he should not, before the deeds are produced, prepare his conveyance (*r*).

Whether an acceptance of the title.

In one case (*s*), the examination of the deeds by a purchaser, who for five months had retained the abstract without delivering any requisitions, was held to be evidence of his having accepted the title. The case depended upon its special circumstances, and cannot be considered as establishing any general rule upon the subject; but it may render it occasionally prudent, in calling for the deeds, to do so with an express reservation of all pending and future questions on the title.

(*m*) *Rippingall* v. *Lloyd*, 2 N. & M. 110.

(*n*) S. C., 419.

(*o*) Sug. 131.

(*p*) Sug. 131, but as to furnishing copies on completion, see Ch. XIII., s. 7.

(*q*) *Cordell* v. *Archer*, 2 A. & E. 500.

(*r*) *Jarman* v. *Eaglston*, 5 C. & P. 172.

(*s*) *Pegg* v. *Wrighn*, 16 B. 239.

(2.) *Production of deeds—may be compelled, by whom.*

Production of deeds—may be compelled, by whom.

Owner of undivided share.

Where an estate is held in undivided shares, the owner of any share may compel the owner of any other share who holds the deeds relating to the common title to produce them for the satisfaction of a purchaser (*t*).

Of estate held under several titles created by single instrument.

So, where estates are held in severalty under separate titles created by a single instrument—as in the case of a settlement, exchange, or partition (*u*),—the owner for the time being of any one such estate, or, it is conceived, of any part of it, may enforce production of such instrument. As between owners of several estates held under the same title, he who can get possession of the deeds has a right to retain them (*x*).

Purchaser of portion of estate.

Where a portion of an estate has been sold by the owner, who retains the deeds, the purchaser can, it appears (*y*), enforce their production upon a resale (*z*), unless there was an understanding to the contrary: which would probably be implied from the circumstances of the title not being required upon the original sale.

Legal tenant for life entitled to custody.

Where an estate is in settlement, the legal tenant for life is *primâ facie* entitled to the custody of the title deeds (*a*): and the Court will not interfere with this right, except in cases where he has been guilty of misconduct; or where

(*t*) See *Lambert* v. *Rogers*, 2 Mer. 490; *Burton* v. *Neale*, 2 Cox, 242; Sug. 443; *Thorpe* v. *Holdsworth*, 7 Eq. 139, 150; see Bray on Discovery, 276.

(*u*) *Lord Banbury* v. *Briscoe*, 2 Ch. Ca. 42; Sug. 442; and see *Shore* v. *Collett*, G. Coop. 234; and *A.-G.* v. *Lambe*, 3 Y. & C. 162; *S. C.* at the Rolls, 11 B. 213; *Ricard* v. *Inclosure Commissioners*, 4 E. & B. 329: the order in *Harrison* v. *Coppard*, 2 Cox, 318, seems to have been by consent; and see *Elton* v. *Elton*, 27 B. 632; where the Court made it a term of the delivery of the partition deed to one of several parceners, that the deed itself should be enrolled in Chancery, and a covenant given for its production.

(*x*) *Foster* v. *Crabb*, 12 C. B. 136; cf. *Wright* v. *Robotham*, 33 Ch. D. 106.

(*y*) But formerly not at Law, Sug. 447, note; except in cases coming within the 14 & 15 V. c. 99, s. 6.

(*z*) *Tam* v. *Ayers*, 2 S. & S. 533; in this case the purchaser claimed to be entitled to a covenant for production under the covenant for further assurance, but this particular point was not decided.

(*a*) *Garner* v. *Hannyngton*, 22 B. 444.

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the Court is carrying out the trusts of the property, and the deeds are wanted for that purpose (*b*). But, he cannot, it seems, insist on this right as against trustees who, though taking no estate, have active duties to perform; or where, on other grounds (as, *e.g.*, on account of a pending suit), it is more convenient that the deeds should remain in their possession (*c*); and if wanted for a proper purpose, their production can be enforced by a vested remainderman, or by a purchaser from him (*d*); but it seems that a contingent remainderman cannot enforce their production, even for the purpose of effecting a sale or mortgage (*e*); and it has been thought that, as a general rule, a vested remainderman cannot compel their production except under special circumstances (*f*); but, in a modern case, the Court, although admitting that the ordering of such production was not a matter of right, but rested in the discretion of the Court, and that it would not be directed unless for a purpose which the Court should deem to be proper, held the principle to be that the person so entitled in remainder or his mortgagee is entitled to, and may compel, such production; and if it be suggested that the purpose for which the documents are required is an improper one, the burthen of proving this lies on the party resisting production; but that the right only exists where the title of the plaintiff to the interest which he claims in the land is free from all reasonable cause of litigation (*g*): and this seems to be the reasonable doctrine.

Whether vested remainderman can enforce production.

(*b*) *Leathes* v. *Leathes*, 5 Ch. D. 221. Where a woman, married before the Married Women's Property Act, 1882, is tenant for life, her husband is entitled in her right to the custody of the deeds, *In re Rogers*, 26 Ch. D. 31. But whether the husband's trustee in bankruptcy has any right to their custody: *quære*, *ibid.*; and see *Schoole* v. *Sall*, 1 Sch. & L. 176.

(*c*) *Stanford* v. *Roberts*, 6 Ch. 307.

(*d*) *Lord Lempster* v. *Lord Pomfret*, 1 Dick. 238; *Davis* v. *Lord Dysart*, 20 B. 405; 21 B. 121.

(*e*) *Noel* v. *Ward*, 1 Mad. 322.

(*f*) See 2nd Ed. 227; *Shaw* v. *Shaw*, 12 Pr. 167; *Lord Lempster* v. *Lord Pomfret*, 1 Dick. 238.

(*g*) *Davis* v. *Lord Dysart*, *supra*; *R. Cocan*, 33 Ch. D. 179. A person who is out of possession, and whose ultimate right to keep possession of the title deeds depends on the validity of his title, may maintain a suit for their delivery up to him, if the evidence in support of his title is not in his own power, but depends on the production of the deeds of which delivery is prayed; *Whittingham* v. *Cusack*, 6 I. R. Eq. 451.

Remainder-man under a purchase-deed.

And it is conceived, that where, as sometimes happens, A. and B. jointly purchase property, taking the conveyance so as to give to B. merely an estate in remainder, B. has a general right to the production of the muniments of title.

Mortgagee formerly need not produce deeds until paid off.

Before the Conveyancing Act, 1881, a mortgagee was not, in general, bound to produce the deeds until he was paid off (*h*), even although the devisee of the mortgaged estate might be ignorant of particulars relating to the security (*i*): it was, however, held that this immunity did not, as between mortgagor and mortgagee, extend to the mortgage deed itself; for this is as much evidence of the mortgagor's title to redeem, as it is of the mortgagee's estate (*k*): but in a later case (*l*) L. J. Giffard, in discharging an order for production, made by V.-C. James, laid it down that after the mortgage had become absolute, the mortgagor could not see the title deeds which he had deposited with the mortgagee, except upon payment of principal, interest, and costs; and, apparently, no distinction was drawn between the mortgage deed and the earlier title deeds, as regards the application of the rule (*m*). A mortgagee who had bought the equity of redemption, subject to a right of re-purchase reserved to the mortgagor and exercisable within a limited period, was within the rule; and need not, unless his money were tendered, produce the deeds for the satisfaction of an intending purchaser from the mortgagor (*n*). Since, however, a person can, as a general rule, give no right which he

(*h*) See *Sparke* v. *Montrion*, 1 Y. & C. 103; *Addison* v. *Walker*, 4 Y. & C. 447; *Greenwood* v. *Rothwell*, 7 B. 291; *Damer* v. *Lord Portarlington*, 15 Si. 380; *Cannock* v. *Jauncey*, 1 Dr. 497, 507. Lord Kenyon is said to have advised a mortgagee to put his deeds into a box and sit upon it, until the money was put into his hands; see 1 Y. & C. 107. The protection extended to drafts, and copies, &c., *Bycroft* v. *Sibel*, 20 L. T. O. S. 197.

(*i*) *Brown* v. *Lockhart*, 10 Si. 421; see *Crisp* v. *Platel*, 8 B. 62.

(*k*) *Patch* v. *Ward*, 1 Eq. 436.

(*l*) *Chichester* v. *Marquis of Donegal*, 5 Ch. 197.

(*m*) As to production of a mortgage deed in bankruptcy under the Act of 1861, see *Re Marks Trust deed*, 1 Ch. 429; and as to production under the Companies Act, 1862, 25 & 26 V. c. 89, s. 115, of documents subject to a solicitor's lien for costs, see *South Essex Estuary, &c. Co.*, 4 Ch. 215.

(*n*) *Smith* v. *Pawson*, 25 L. T. O. S. 10.

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does not himself possess (*o*), the mortgagee of a person who would be liable to produce the deeds must himself, unless he could protect himself by want of notice (*p*), produce them at the suit of those persons who could compel their production as against the mortgagor (*q*); but he would not be justified in so producing them except with the consent of the latter, or under an order of the Court (*r*).

Law altered by Conv. Act, 1881.

In the case of mortgages made since the commencement of the Conveyancing Act, 1881, the mortgagor, so long as his right to redeem subsists, is entitled from time to time, at reasonable times on his request and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of, or extracts from, the documents of title relating to the mortgaged property in the custody or power of the mortgagee (*s*).

Lien of solicitor.

The solicitor of a mortgagee has no lien upon the deeds, as against the mortgagor, to an amount exceeding what is due on the security (*t*). So, the lien of the solicitor of an

(*o*) See *Pelly* v. *Wathen*, 1 D. M. & G. 16; *Gibson* v. *May*, 4 D. M. & G. 512.

(*p*) See *Wallwyn* v. *Lee*, 9 V. 24; a case of a mortgage in fee by a person originally so seised, and who suppressed an intermediate settlement; and see and consider *Heath* v. *Crealock*, 10 Ch. 22; *Joyce* v. *De Moleyns*, 2 J. & L. 374; *Francis* v. *Francis*, 2 D. M. & G. 73, 78; 5 D. M. & G. 108; but see *Newton* v. *Newton*, 4 Ch. 497.

(*q*) *Balls* v. *Margrave*, 4 B. 119; and see *Hercy* v. *Ferrers*, *ib.* 97; also a singular case of *Muston* v. *Bradshaw*, 15 Si. 192; where it was held that a purchaser could not, on the ground of the vendor's wife having possessed herself of the deeds, make her a defendant to a suit for specific performance; and see *Rumbold* v. *Fortreath*, 3 K. & J. 44.

(*r*) *Lambert* v. *Rogers*, 2 Mer. 490. See *Gough* v. *Offley*, 5 De G. & S. 653.

(*s*) S. 16.

(*t*) *Hollis* v. *Coridge*, 4 Taun. 807; *Wakefield* v. *Newbon*, 6 Q. B. 276; *Ryder* v. *Jones*, 2 Y. & C. C. C. 329; *Pelly* v. *Wathen*, 1 D. M. & G. 16; *Hope* v. *Liddell*, 7 D. M. & G. 331; a solicitor who has the custody of the title deeds for the mortgagee, and has used them in preparing for a sale by the direction of the mortgagor, has no lien upon them against the trustee in bankruptcy of the mortgagor for the costs of the attempted sale; *Ex p. Fuller*, 16 Ch. D. 617; but see and distinguish *Ex p. Calvert*, 3 Ch. D. 317, where the deeds were in the custody of the solicitor for the mortgagor; and see *Sheffield* v. *Eden*, 10 Ch. D. 291.

executor upon title deeds of a testator's leaseholds, is subject to the amount (if any) due from his client to the testator's estate (*u*). If the solicitor of the mortgagor induce the solicitor of the mortgagee to part with the deeds, by a verbal undertaking to pay a sum claimed to be due for costs, such undertaking will be enforced summarily upon motion (*v*); and it has been held that the lien of the mortgagor's solicitors upon the engrossment of the reconveyance was not prejudiced by their sending it to the mortgagee's solicitors, with a request that they would hold it for them subject to the lien; and a purchaser from the mortgagor was restrained from proceeding at Law for the recovery of the deed (*y*).

Exceptions from rule.

A mortgagee who consents to a sale by the Court must bring the deeds into Court in the usual way (*z*); and it is conceived that, in an ordinary case, a mortgagee who has countenanced a mortgagor in selling under the expectation of his concurrence, would not be allowed to stop the sale by refusing to produce the deeds before actual payment (*a*).

Liability of mortgagee for loss or destruction of deeds.

A mortgagee who has, even although insane, destroyed (*b*), or has negligently lost (*c*) the muniments of title, will, it seems, be compelled to replace such as can be replaced; and as respects originals, which cannot be replaced, will be required either to give an indemnity, or to make compensation, for the damage thereby done to the estate; but a mortgagee taking the same care of the deeds forming his security as he

(*u*) *Turner* v. *Letts*, 7 D. M. & G. 243.

(*v*) *Re Gee*, 2 D. & L. 997; see, in Equity, *Gilbert* v. *Cooper*, 15 Sj. 343, rev. 647; a solicitor's lien will not entitle him to refuse to produce the deeds for inspection by his client's trustee in bankruptcy; *Ex p. Bramble*, 13 Ch. D. 885, and see now Bankruptcy Act, 1883, s. 27. Delivery up of papers will not be ordered while a suit is pending the costs of which have not been paid by his client; *Ex p. Jarman*, 4 Ch. D. 835.

(*y*) *Watson* v. *Lyon*, 7 D. M. & G. 288, *Newton* v. *Beck*, 3 H. & N. 220.

(*z*) *Livesey* v. *Harding*, 1 B 343.

(*a*) See *Crosse* v. *Reversionary Society*, 3 D. M. & G. 712.

(*b*) *Hornby* v. *Matchan*, 16 Sj. 325, *Brown* v. *Sewell*, 11 Ha. 49.

(*c*) *Lord Midleton* v. *Eliot*, 15 Sj. 531.

took of his own, ought not, it would seem, to be severely dealt with if they are accidentally lost (*d*). His bond has been held a sufficient indemnity to the owner of the equity of redemption (*e*); and if such a bond, and a reconveyance, be executed by the mortgagee, the mortgagor can be compelled to pay the amount due (*f*).

Mortgagee has no right to copies.

A mortgagee, or transferee of a mortgage, on being paid off, has no right to keep copies of the mortgage deed, or deed of transfer; but whatever copies he has, as a general rule, are copies properly paid for by the mortgagor, and are to be delivered up to him when he pays off the mortgage; and no costs of copies will be allowed (*g*). The reason of this rule apparently is, that the mortgagee stands in a fiduciary position subject to his right to payment, and therefore will not be allowed to say that the copies were made for any other purposes than those of the security.

Production of Court Rolls.

The 15 & 16 Vict. c. 51 (*h*) contains provisions for securing to the owners of lands enfranchised under the Copyhold Enfranchisement Acts, the production of the Court Rolls of the manors whereof the lands are holden; and Order XXXI. r. 19 of the R. S. C. 1883, provides for the order upon the lord of a manor for the usual limited inspection of the Court Rolls on the application of a copyhold tenant upon an affidavit that the tenant has applied for and been refused inspection (*i*).

Statutory right to production.

We may here refer generally to the statutory powers (*k*) conferred upon the Court to compel production and inspection

(*d*) *Woodman* v. *Hughes*, 14 Jur. 816; *James* v. *Rumsey*, 11 Ch. D. 398.

(*e*) *Shelmardine* v. *Harrop*, 6 Mad. 39; and see a form of bond, *ib.* 41, n.

(*f*) *Stokoe* v. *Robson*, 19 V. 385, *Smith* v. *Bickhall*, 3 V. & B. 51, n.; *Shelmardine* v. *Harrop*, *ubi supra*.

(*g*) *Re Wade and Thomas*, 17 Ch. D. 348.

(*h*) Sects. 20, 21.

(*i*) As to the right to production and to an acknowledgment from the lord of the manor on enfranchisement, see *Re Agg-Gardner*, 25 Ch. D. 600.

(*k*) See Order 31 of R. S. C. 1883.

of documents; and also to the power which the Chancery Division of the High Court has, under the Companies Act, 1862 (*l*), after a winding up order has been made, to compel the production of deeds or other documents relating to the company (*m*).

(3.) *Non-production of deeds—how far important.*

Section 3.

Non-production of deeds—how far important.

Importance of non-production of deeds.

May affect purchaser with notice of their deposit.

The non-production of the deeds is material, not only as it deprives the purchaser of the usual means of verifying the title deduced upon the abstract, but as inducing a suspicion that they may have been deposited by way of equitable mortgage: it has even been held, on a sale of a public house in London, that their non-production amounted to notice to a mortgagee of such a deposit with the brewers who supplied the house (*n*). This decision has been disapproved of (*o*): and has been thought to depend upon the presumed notoriety of the practice of London publicans so to deposit their deeds, and upon the fact of the mortgagee having been aware that the publican was indebted to the brewers; in fact, the Court considered that there was wilful blindness, the security having been taken for the repayment, not of a contemporaneous advance, but of a sum already due (*p*): however, in one case, it was held by Sir L. Shadwell, V.-C., that the omission to ask for the deeds was sufficient to postpone a mortgagee who took a conveyance of the legal estate by way of security for a pre-existing debt, although it did not appear that he was aware of the mortgagor being indebted to the prior incumbrancer (*q*).

(*l*) 25 & 26 V. c. 89, s. 115.

(*m*) See *Re South Essex Estuary Co.*, 4 Ch. 215.

(*n*) *Whitbread* v. *Jordan*, 1 Y. & C. 303.

(*o*) See 4 Y. & C. 563; Sug. 767.

(*p*) 1 Ph. 255.

(*q*) *Worthington* v. *Morgan*, 16 Si. 547, where it appeared that the security was for money previously due; and see *Hewitt* v. *Loosemore*, 9 Ha. 449; *Peto* v. *Hammond*, 30 B. 195, but see *Agra Bank* v. *Barry*, L. R. 7 H. L. 135; *Manners* v. *Mew*, 29 Ch. Div. 725, and cases there cited; see *post*, pp. 959 *et seq.*, 979.

Chap. IX. Section 1.

(1.) *Examination of deeds—matters to be observed in.*

Examination of deeds—matters to be observed in.

Points to be attended to in comparing abstract with the deeds.

In the examination of the abstract with the documents, the most scrupulous care is requisite on the part of the solicitor. The object of the examination is to ascertain, 1st, that what has been abstracted is correctly abstracted; 2ndly, that what is omitted is clearly immaterial; 3rdly, that the documents are perfect, as respects execution, attestation, indorsed receipts, registration, stamps (*r*), &c.; and 4thly, that there are no indorsed notices, nor any circumstances attending the mode of execution, attestation, &c., &c., calculated to excite suspicion (*s*). Anything out of the ordinary course—*e.g.*, formerly the unusual position of the indorsed receipt (*t*)—should be made the subject of inquiry. Every part of every document ought to be read through, especially the covenants for title, &c., in a conveyance or mortgage. Notice of an incumbrance is equally notice whether contained in one or in another part of a deed (*u*): and if an important point be overlooked, the purchaser, after the conveyance is executed and the purchase-money is paid, will have no remedy against the vendor unless it falls within the covenants for title; and this, apparently, even although the abstract may have been incorrect (*x*). Perhaps few of the most important duties of a solicitor are so frequently performed in a perfunctory manner.

Erasures and interlineations.

We may here remark, as connected with the present subject, that erasures and interlineations in a *deed* are to be presumed to have been made prior to, or at the time of, its execution (*y*); as, on any other supposition, a crime must be

(*r*) A purchaser is entitled to have all deeds (including even a discharged mortgage), which form part of the chain of title, properly stamped, *Whiting* to *Loomes*, 14 Ch. D. 822; 17 Ch. D. 10; and see and distinguish *Ex parte Birkbeck Land Society*, 24 Ch. D. 119.

(*s*) See *Kennedy* v. *Green*, 3 M. & K. 699.

(*t*) *Kennedy* v. *Green*, *supra*, and the judgment in *Greenslade* v. *Dare*, 20 B. 284, but see now Conv. Act, 1881, s. 54.

(*u*) See *Smith* v. *Capron*, 7 Ha. 189.

(*x*) See *M'Culloch* v. *Gregory*, 1 K. & J. 291.

(*y*) *Doe* v. *Catomore*, 16 Q. B. 745.

presumed to have been committed (z): but, in the absence of proof to the contrary, erasures and interlineations on the face of a will are presumed to be made *after* its execution (a); and also after the execution of a codicil, which does not refer to them (b). It seems that unattested alterations in a will dated before, but coming into operation after, the late Wills Act are presumed to have been made before the Act (c).

(z) Per V.-C. W. in *Williams* v. *Ashton*, 1 J. & H. 115, 118.

(a) *Doe* v. *Palmer*, 16 Q. B. 747; *Cooper* v. *Bockett*, 4 Mo. P. C. 419; *Greville* v. *Tylee*, 7 *ib.* 320; *Freeman* v. *Stringel*, 13 Jur. 1030; *Simmons* v. *Rickell*, 1 Sr. N. S. 115, 136; *Gauw* v. *Gregory*, 3 D. M. & G. 777; *Re White*, 6 Jur. N. S. 898; and see *Williams* v. *Ashton*, 1 J. & H. 115, 118, and statement of the rule in the judgment.

(b) *Pooley* v. *Mullen*, 6 Jur. N. S. 1165. Alterations in a soldier's will which was signed by him while he was on actual military service are presumed to have been made during the continuance of such service, *Re Tweedale*, L. R. 3 P. & D. 204.

(c) *Re Streeter*, 28 L. J. Prob. 50.

Chapter X.

CHAPTER X.

AS TO MATTERS ARISING BETWEEN DELIVERY OF ABSTRACT AND PREPARATION OF CONVEYANCE.

1. *Time, when essential at Law and in Equity.*

2. *Objections to title—negotiations upon and waiver of—when possession taken amounts to waiver.*

3. *General rights and liabilities of purchaser in possession.*

4. *Vendor in possession—alteration of property by, may avoid contract.*

5. *As to entry and possession by railway companies before completion.*

Section 1.

Time formerly essential at Law.

(1.) At Law, the time fixed for completion was formerly of the essence of the contract (*a*); and the purchaser might recover his deposit, unless the vendor could deduce and verify a marketable title and give a conveyance at the time agreed on (*b*).

Judicature Act, 1873.

Since the Judicature Act, 1873, stipulations in contracts as to time or otherwise which would not, before the passing of the Act, have been deemed to be or to have become of the essence of such contracts in a Court of Equity, are to receive in all Courts the same construction and effect as they would formerly have received in Equity (*c*).

Time, how far essential in Equity.

In Equity it has always been the rule that although unreasonable delay will of itself conclude either party, the Court

(*a*) *Berry* v. *Young*, 2 Esp. 640, n.; *Stowell* v. *Robinson*, 3 Bing. N. C. 928; *Marshall* v. *Powell*, 9 Q. B. 779, 791; *Hanslip* v. *Padwick*, 5 Ex. 623.

(*b*) Sug. 259. See also *Fowler* v. *Gardner*, 8 C. B. 461; *Maryon* v. *Carter*, 4 C. & P. 295, *Carter* v. *Scargill*, L. R. 10 Q. B. 564.

(*c*) S. 25 (7); see as to this provision, *Noble* v. *Edwards*, 5 Ch. D. 378.

will relieve against, or enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract either for completion, or for any of the steps towards completion, if it can do justice between the parties (*d*); and if there is nothing in the express stipulations of the agreement, or the nature of the property, or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it said that in Equity time is not of the essence of the contract (*e*). This equitable doctrine has, of course, no application where time has been made of the essence of the contract by express agreement (*f*); or where, from the nature of the property or other circumstances, it is clear that such must have been the intention of the parties (*g*).

As where vendor incurs liability by keeping property;

For instance, on an agreement by a tenant at will of a public house for the sale of the possession, trade, and goodwill, at a fixed sum, and of the stock and furniture at a valuation, possession to be taken and the money paid on a given day, the delay of a single day on the part of the purchaser in having the valuation completed, and in taking possession and paying the purchase-money, was held to relieve the vendor from the contract: inasmuch as he incurred fresh liabilities by retaining the premises, and the stock in the meantime varied (*h*).

So, upon the sale of a public house as a going concern, time is of the essence of the contract; and if the vendor cannot, by the day appointed for the completion of the purchase, procure a transfer of the licence under the Licensing Act, the purchaser may repudiate the contract (*i*).

(*d*) See Lord Cairns, C., in *Tilley* v. *Thomas*, 3 Ch. 67.

(*e*) Per Turner, L. J., in *Roberts* v. *Berry*, 3 D. M. & G. 284.

(*f*) *Honeyman* v. *Marryatt*, 21 B. 24.

(*g*) Sug. 262; *Lennon* v. *Napper*, 2 Sch. & L. 682; *Roberts* v. *Berry*, 3 D. M. & G. 284; *Parkin* v. *Thorold*, 16 B. 59, overruling *S. C.*, 2 Sk. N. S. 1.

(*h*) *Coslake* v. *Till*, 1 Rus. 376.

(*i*) *Seaton* v. *Mapp*, 2 Coll. 556; 9 Geo. IV. c. 61; 35 & 36 V. c. 94, s. 75; *Day* v. *Luke*, 5 Eq. 336; *Claydon* v. *Green*, L. R. 3 C. P. 511; *Coulls* v. *Gale*, 7 Ch. 12, following

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or property is of fluctuating value;

So, the fluctuating value of the property may alone show that time was to be of the essence of the contract: as upon an agreement for the sale of foreign stock (*k*), or of a mining lease (*l*), or of a reversion, which may become an estate in possession during the delay, and the sale of which generally evidences immediate want of money (*m*), or a life annuity, or life estate, which may determine by the death of the *cestui que vie* (*n*).

or of a determinable character;

or of a wasting character;

So, where the property is of a wasting character, as, *e.g.*, a leasehold for a short unexpired term (*o*).

or is evidently required at once;

So, where the purchaser evidently requires the property for his residence (*p*), or for some other immediate purpose (*q*).

or where the vendors are a fluctuating body.

So, where the vendors, (being beneficially interested,) are a fluctuating body (as in the case of a dean and chapter), where delay may give the purchase-money to persons other than those who signed the contract (*r*).

Modern decisions tend to render time material.

And the tendency of modern decisions has been to hold persons concerned in contracts relating to land, bound, as in other contracts, to regard time as material; and this principle has been applied with the greater strictness where the property was connected with trade (*s*). The question is,

Day v. *Tuhle*; see, too, s. 9 of 32 & 33 V. c. 27, regulating the transfer of licences; and see now 35 & 36 V. c. 94, ss. 10, 75.

(*l*) *Dobree* v. *Rothschild*, 1 S. & S. 500.

(*l*) *Macbryde* v. *Weekes*, 22 B. 533.

(*m*) See *Newman* v. *Rogers*, 4 Br. C. C. 391; *Spencer* v. *Hancock*, 1 V. 667, 672; *Hopwell* v. *Knight*, 1 Y. & C. 401, 416; *Wyndl* v. *Bp. of Exeter*, 1 Pr. 292, 298.

(*n*) See *Withy* v. *Cottle*, T. & R. 78.

(*o*) *Hudson* v. *Temple*, 29 B. 536, 543.

(*p*) *Gedye* v. *Duke of Montrose*, 26 B. 45; *Levy* v. *Lindo*, 3 Mer. 84; *Tilley* v. *Thomas*, 3 Ch. 61; *Webb* v. *Hughes*, 10 Eq. 281.

(*q*) *Wright* v. *Howard*, 1 S. & S. 190; *Parker* v. *Frith*, *ib.* 199.

(*r*) *Carter* v. *Dean of Ely*, 7 Si. 211.

(*s*) Per Wigram, V.-C., in *Walker* v. *Jeffreys*, 1 Ha. 348; and see *Wright* v. *Howard*, 1 S. & S. 190; *Parker* v. *Frith*, *ib.* 199, n., *Coslake* v. *Till*, 1 Rus. 376; *Sparrow's case*, cited 2 Sch. & L. 604; *Seaton* v. *Mapp*, 2 Coll. 556; and Lord Cranworth's decision in *Parkin* v. *Thorold*, 2 Si. N. S. 1; which, however, went very far, and has since been overruled;

however, in all cases one of intention, depending on the nature of the property and the true construction of the contract (*t*).

Exercise of right of pre-emption.

So, an option to purchase under a right of pre-emption must be exercised within the prescribed period (*u*).

Purchase-money wanted to discharge incumbrances.

So, the circumstance of the purchase-money being evidently required for payment of incumbrances, is important; especially if the rate of interest which they bear exceed that which the purchaser is to pay during delay (*v*).

Private unexpressed motives for purchase.

But the private motives which may have induced a party to enter into a contract, unless expressed in the agreement, or such as might be presumed from the general apparent circumstances of the case, do not make time essential; *e.g.*, the unexpressed intention to reside immediately upon the estate (*y*): where, however, the motive is of material importance—as in the case of the intention to reside—although not disclosed in the contract, it would, it appears, be sufficient to bind the vendor to the time named in the contract, if communicated at or within a reasonable period after its execution (*z*).

Time made essential as to objections to title is not thereby made essential as to completion of purchase.

A stipulation that time shall be of the essence of the contract as respects the delivery of objections to the title, raises a presumption that it is not to be essential as regards the *completion* of the purchase; and this presumption is

S. C., 16 B. 59; *Wills* v. *Maxwell*, 32 B. 408, *Gedye* v. *Duke of Montrose*, 26 B. 45; *Hudson* v. *Bartram*, 3 Mad. 440, *Barclay* v. *Messenger*, 13 L. J. Ch. 419, and see cases cited *ante*, p. 183.

(*t*) *Patrick* v. *Milner*, 2 C. P. D. 342.

(*u*) *Brooke* v. *Garrod*, 2 D. & Jo. 62, 66; *Alderson* v. *White*, 3 Jur. N. S. 1316; *Austen* v. *Taunay*, 2 Ch. 143; *Rowlands* v. *Evans*, 8 Jur. N. S. 88; *Lord Ranelagh* v. *Melton*, 10 Jur. N. S. 1141, *Evans* v. *Stratford*, *ib.* 861. A written acceptance within the period is of course sufficient to constitute a contract without more, *Mills* v. *Haywood*, 6 Ch. D. 196.

(*v*) *Popham* v. *Eyre*, Lofft, 786; Sug. 262; *Anon.*, cited 2 Sch. & L. 604.

(*w*) *Lacon* v. *Wood*, 1 J. & W. 422, *Dyer* v. *Hargrave*, 10 V. 508.

(*x*) See 7 V. 279; *Noles* v. *Lord Kilmorey*, 1 De G. & S. 444; *Gedye* v. *Duke of Montrose*, 26 B. 45.

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strengthened by a provision for the payment of interest by the purchaser, in the event of the purchase not being completed by the day named (*a*).

Undertaking to deliver possession.

Nor is a mere undertaking that possession (which in such a stipulation means not merely actual possession, but possession with a good title shown (*b*),) shall be delivered on a certain day, of itself binding in Equity (*c*).

Effect of wilful delay;

In all the above cases the delay may be supposed to have arisen from the state of the title, or otherwise without any wilful or gross neglect by the party in default; gross or wilful neglect (*d*), however, by either party, will, in any case, entitle the other party to avoid the contract in Equity; *e.g.*, where the vendor, although urged by the purchaser to make out his title, takes no steps to do so, the purchaser immediately upon the expiration of the time fixed for completion may rescind the agreement (*e*).

of protest without active pressure.

Where time is of the essence of the contract, the purchaser should not be content with merely asking the vendor to take the necessary steps towards completing the purchase, but should diligently press him to do so (*f*); and a purchaser who takes no steps to enforce the contract within a reasonable time, will be left to his remedies at Law; and the strong tendency of modern decisions is to diminish the time allowed to either party for enforcing his rights under the contract. But, of course, where the contract, though incomplete, has

(*a*) *Wells* v. *Maxwell*, 32 B. 408 cf. *Webb* v. *Hughes*, 10 Eq. 281.

(*b*) *Tilley* v. *Thomas*, 3 Ch. 61.

(*c*) *Bochm* v. *Wood*, 1 J. & W. 419; and see *Webb* v. *Hughes*, 10 Eq. 281, where the negotiations were continued by the purchaser after the date on which he had stipulated for possession; *Patrick* v. *Milner*, 2 C. P. D. 342. As to what is delivery of possession, see *Lake* v. *Dean*, 28 B. 607, and *infra*.

(*d*) *Lennon* v. *Napper*, 2 Sch. & L. 682; *Roberts* v. *Berry*, 3 D. M. & G. 289, *Tilley* v. *Thomas*, 3 Ch. 61.

(*e*) *Lloyd* v. *Collett*, 4 Br. C. C. 469, cited 5 V. 757, *Wade* v. *Jeffery*, 4 Pr. 294, *Venn* v. *Cattell*, 27 L. T. 469.

(*f*) *Brooke* v. *Garrod*, 3 K. & J. 608, 616; *Williams* v. *Glenton*, 1 Ch. 200.

been acted on, and either party has substantially had the benefit contracted for, time does not so readily run (*g*).

When title must be shown in Equity,

Where time is not of the essence of the contract, and the delay originates in the state of the title, it is sufficient, upon a bill for specific performance being filed by the vendor, if a good title be shown at the date of the decree (*h*), or of the investigation at chambers, if the title is referred to chambers.

and at Law.

And formerly, at Law, where no time was fixed for completion, and the purchaser did not require the title to be produced, and none was produced before an action had been commenced by the vendor, it was sufficient if the latter perfected his title at any time before the trial (*i*); but if a title were produced, and proved defective or were not properly verified, or, *à fortiori*, if the vendor on being required to produce a title altogether neglected to do so, the production of a perfect title before trial was insufficient (*k*).

Time may be limited by notice,

But although time may not originally have been of the essence of the contract, either party may, by proper notice, bind the other to complete within a reasonable specified period (*l*); and the question whether the period is reasonable must be judged of as at the time when the notice is given (*m*).

allowing a reasonable period.

The notice should, at least as a matter of precaution, be in writing, and should allow a reasonable time for completion: what time can be so considered, must greatly depend upon the circumstances of the particular case. Three days' notice by a vendor would be too short (*n*); even six weeks has been held to be insufficient (*o*); so, a week's notice by a purchaser,

(*g*) *Sharp* v. *Milligan*, 22 B. 606.

(*h*) *Post*, p. 1227 *et seq.*; and see *Southcomb* v. *Bp. of Exeter*, 6 Ha. 213.

(*i*) *Thomson* v. *Miles*, 1 Esp. 184.

(*k*) *Vide post*, p. 1086.

(*l*) *Stewart* v. *Smith*, 6 Ha. 223, n.; see *Heaphy* v. *Hill*, 2 S. & S. 29; *Webb* v. *Hughes*, 10 Eq. 281, and cases cited in next notes.

(*m*) *Crawford* v. *Longood*, 13 Ch. D. 153.

(*n*) See *Reynolds* v. *Nelson*, 6 Mad. 18; Sug. 268.

(*o*) *Pigg* v. *Wisden*, 16 B. 239.

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within which time the vendor was required to prove a disputed legitimacy, was held too short (*p*); so, two months' notice by a purchaser, where the vendor was taking active steps to remove the only two remaining objections to the title, but for the removal of which longer time was obviously wanted (*q*); but two months' notice by a purchaser, within which time the vendor was required to remove an objection to the title depending upon a defective execution of a power, appears to have been considered sufficient in one case, which was, however, decided upon another point (*r*). In another case, where a delay of two months had occurred in procuring the execution of the conveyance by certain parties, a ten days' notice by the purchaser was considered sufficient (*s*). In a later case, a notice requiring the vendor to complete the title within fourteen days after the day originally named for completion was considered unreasonable (*t*); but in a still later case, a month's notice by a purchaser after two months' delay was considered sufficient; although the performance of the contract depended upon the vendor being able to enter into a complete arrangement with third parties; but the decision in this case rested in a great measure upon the fluctuating character of the property (*u*).

As to the deposit.

It is not, as a general rule, essential to the binding effect of a vendor's notice that he should, at the expiration of it, return or tender the deposit (*v*); nor, on the other hand, where the purchaser's notice has expired, is he bound to bring an action for his deposit (*y*).

Purchaser cannot re-

But a purchaser cannot, in general, determine the contract

(*p*) *King* v. *Wilson*, 6 B. 124.

(*q*) *Wells* v. *Maxwell*, 32 B. 408; *McMurray* v. *Spicer*, 5 Eq. 527.

(*r*) *Southcomb* v. *Bishop of Exeter*, 6 Ha. 213. Five weeks was held too short in *Crawford* v. *Toogood*, 13 Ch. D. 153; and three weeks in *Green* v. *Sevin*, *ib.* 589; but each case is to be determined on its own special circumstances.

(*s*) *Benson* v. *Lamb*, 9 B. 502.

(*t*) *Parkin* v. *Thorold*, 16 B. 59; *S. C.*, 2 Si. N. S. 1; *Nott* v. *Riccard*, 22 B. 307.

(*u*) *Macbryde* v. *Weekes*, 22 B. 533; *Haywood* v. *Cope*, 25 B. 140.

(*x*) Sug. 269.

(*y*) *Southcomb* v. *Bishop of Exeter*, 6 Ha. 213.

without due previous notice (z); although notice even of immediate determination would, it is conceived, be so far material as that it would more strongly impose upon the vendor the necessity of using expedition in proceeding to enforce the contract (a); and where the vendor has positively refused to comply with the purchaser's valid requisition, the latter may, after allowing the vendor a short time for considering whether he will persist in his refusal, or, perhaps, even without giving any further notice, rescind the contract (b); and the same principles would, it is conceived, apply to notices by a vendor. If the vendor himself fails to fulfil the conditions as to time, he cannot hold the purchaser to them (c).

and without notice.

Where a railway company had power at any time within seven years to take land for the purposes of the undertaking, and agreed to purchase land, and to pay interest upon the purchase-money from the day they should commence their works on the land until the purchase-money should be paid, it was held that the vendor could not enforce specific performance; the company not having commenced their works, and the seven years limited by the Act remaining unexpired (d).

Time when held to remain at option of purchasers.

And time, although of the essence of the contract by original agreement, or made imperative in Equity by subsequent notice, may be enlarged or waived, by subsequent agreement, or by conduct of the parties amounting to waiver (e).

Time, although essential, may be enlarged or waived:

Thus, if a purchaser proceed in the purchase after the expiration of the time fixed by the contract (f), or limited

by proceeding in purchase;

(z) *Taylor* v. *Brown*, 2 B. 180; *Wood* v. *Machu*, 5 Ha. 158.

(a) See *Guest* v. *Homfray*, 5 V. 818.

(b) *Nott* v. *Ricard*, 22 B. 307; *King* v. *Chamberlayn*, W. N. (1887), 158.

(c) *Southby* v. *Hull*, 2 M. & Cr. 207; *Upperton* v. *Nicholson*, 6 Ch. 436.

(d) *Bodmyton* v. *G. W. R. Co.*, 13 Jur. 144.

(e) *Cutts* v. *Thodey*, 13 Sl. 206; *Noles* v. *Lord Kilmorey*, 1 De G. & S. 444.

(f) *Boyes* v. *Liddell*, 6 Jur. 725.

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by his notice (*g*), it amounts to waiver (*h*): the same rule holds good as regards a vendor (*i*). But the mere enlargement of time by the vendor does not amount to a waiver (*k*).

or by neglect to require possession.

So, where a purchaser made no demand of the possession of the purchased premises until a quarter before twelve at night on the day fixed for completion—part of the property consisting of cottages let to weekly tenants—this was held, at Law, to be a waiver of the condition as to time (*l*).

Conditional waiver.

A conditional written waiver by a purchaser of his previous notice of abandonment, will be construed strictly against the vendor (*m*).

Time for delivery of abstract, how waived in Equity.

And where the conditions provide for delivery of the abstract at a certain time, the purchaser waives them in Equity by receiving the abstract after that time: or even, it would seem, by perusing it unnecessarily, or retaining it, when delivered under circumstances which prevent its immediate rejection (*n*). So, a vendor who receives and entertains the purchaser's requisitions delivered after the time specified, waives his right (unless expressly reserved) to insist on the conditions (*o*); and, as a general rule, either party relying on time being essential, as a defence to an action for specific performance, should make the point promptly (*p*).

And, at all events, where it is not the duty of the vendor to deliver an abstract, a condition for its delivery on a certain day, is waived in Equity by a purchaser who does not ask for it within a reasonable time before the day fixed for its

(*g*) *Webb* v. *Hughes*, 10 Eq. 281; *Flint* v. *Woodin*, 9 Ha. 618.

(*h*) *King* v. *Wilson*, 6 B. 124; and see *Ex parte Gardner*, 4 Y. & C. 503.

(*i*) *Pigg* v. *Wisden*, 16 B. 239.

(*k*) *Parlett* v. *Thorold*, 2 Si. N. S. 1; Sug. 270; *Barclay* v. *Messenger*, 43 L. J. Ch. 449.

(*l*) *Palmer* v. *Temple*, 9 A. & E. 508; *Carpenter* v. *Blandford*, 8 B. & C. 575.

(*m*) See *Stewart* v. *Smith*, 6 Ha. 222, n.

(*n*) *Seton* v. *Slade*, 7 V. 278; *Hipwell* v. *Knight*, 1 Y. & C. 401; *Magennis* v. *Fallon*, 2 Moll. 576.

(*o*) *Oakden* v. *Pike*, 11 Jur. N. S. 666.

(*p*) *Monro* v. *Taylor*, 3 M. & G. 713.

delivery (*q*): the same rule would, no doubt, apply to the production of evidence, &c.: and it is conceived that a waiver of time as respects matters (such as the delivery of the abstract, &c.,) which *must* necessarily precede completion by a considerable period, would, in general, amount to a waiver of the time (if any) fixed for completion.

Time waived by not objecting to certain or highly probable delay in completion.

So, a stipulation that time shall be of the essence of the contract, is waived by a purchaser who receives, and retains without objection, an abstract upon the face of which it appears that a title cannot be made within the time fixed for completion (*r*); or who, without an objection on that specific ground, proceeds with the purchase under a knowledge that there is no reasonable probability of the title being perfected in time for completion; as when it depends upon the result of a hostile chancery suit (*s*).

Protest.

It is not easy to see how a mere protest against the delay can save the benefit of the stipulation (*t*): it is conceived that, until the expiration of the time limited for completion, a purchaser may safely, and is indeed bound to, proceed in the matter so long as a reasonable probability exists of the title being perfected in time; taking care, nevertheless, to protest in writing against the delay, and to give notice of his intention to insist on his strict rights. When the time has expired, or when previously it becomes certain that the title cannot be perfected in time, he should take no further steps in the matter, but should in writing rescind the contract; and then, if inclined to give the vendor the opportunity of completing within a reasonable period, all subsequent communications should be expressed to be without prejudice to the notice of rescission, and should take the shape of mere negotiations for a fresh agreement.

(*q*) *Suprà*, and see Sug. 260.

(*r*) See *Hipwell* v. *Knight*, 1 Y. & C. 401, 419.

(*s*) *Pincke* v. *Curties*, 4 Br. C. C. 332; *Wood* v. *Bernel*, 19 V. 220; and see *Williams* v. *Glenton*, 1 Ch. 200.

(*t*) See Sug. 265, but see *Williams* v. *Glenton*, *suprà*, and *ante*, p. 486.

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"Month" means *primâ facie* a lunar month.

It may be observed, that even in a contract for, or connected with, the sale of land, the term *month* means *primâ facie* a lunar month; although it may be construed a calendar month, if, from the context, or from the surrounding circumstances, at the time of making the contract, such appears to have been the intention of the parties (*u*). In Acts of Parliament the term month is to mean a calendar month, unless words are added showing that a lunar month is intended (*x*); and every Act is now to be deemed a public Act, unless the contrary be expressly provided (*y*).

Section 2.

Objections to title;—negotiations upon and waiver of;—when possession taken amounts to waiver.

Effect of negotiations upon condition as to objections.

Solicitor purchasing cannot object to title which he accepted for his client.

(2.) *Objections to title;—negotiations upon and waiver of,—when possession taken amounts to waiver.*

We have already (*z*) adverted to the effect which negotiations with respect to the title may have upon the vendor's rights under the ordinary conditions limiting a time for taking objections, and giving him the power to rescind the contract.

It may be observed that a solicitor purchasing from his client, cannot insist upon any objections to the title which he —or his then partner in the case of a firm—considered unimportant when acting for the client upon his original purchase (*a*). The rule, however, it is conceived, would not preclude objections founded upon alterations which had been made in the Law in the interval between the purchase and the resale. Subject to this qualification, it would seem to be also applicable to counsel.

(*u*) *Lang* v. *Gale*, 1 M. & S. 111; *Simpson* v. *Margitson*, 11 Q. B. 23; and see Lord St. Leonards' remarks, V. & P. 257, on *Hipwell* v. *Knight*, 1 Y. & C. 401. As to the meaning of "next" in this connection, see *Davies* v. *Chawsley*, W. N. (1886) 78; *ante*, p. 112, note (*p*).

(*x*) 13 & 14 V. c. 21, s. 4. This enactment is not retrospective.

(*y*) S. 7.

(*z*) *Ante*, p. 183.

(*a*) *Beeton* v. *Simpson*, Taml. 69.

Danger of frivolous objections and requisitions.

Care should be taken not to make frivolous or unnecessary objections or requisitions: objections clearly frivolous, made and persisted in, would certainly indispose, even if they did not prevent (*b*), a Court of Equity from enforcing the contract at the suit of the purchaser. It perhaps seldom happens, upon the perusal of an abstract, that his advisers confine their requisitions within the strict limits of their client's rights, or within the limits prescribed by the conditions. Points which could not perhaps be absolutely insisted on, but which are yet of real moment, may often, if urged, be conceded, either from courtesy, or as the price of the purchaser's relinquishing requisitions which, although capable of being enforced, are yet of less practical importance. It is, however, material that no untenable requisition should be tenaciously adhered to: for instance, where a purchaser had required unnecessary evidence, and had in consequence been refused that to which he was really entitled, he was not allowed his costs, although he obtained a decree for specific performance (*c*). In one case, when a purchaser from a mortgagee alleged that the latter was unable to deliver possession, and insisted on the concurrence of the mortgagor, although the mortgagee offered to deliver possession, it was held, in a suit for specific performance, that the mortgagee was entitled to a decree with costs, if *then* able to deliver possession; and the Court refused to inquire whether, when his offer to deliver possession was not accepted, he was able to perform it (*d*). It seems difficult to support the latter branch of the decision.

Effect of recent cases.

In this connection it may be observed that the recent cases of *Re Dames and Wood* (*e*), and *Glenton to Haden* (*f*), which have been already discussed (*g*), render it more than ever necessary to exercise great caution in framing requisitions, in all cases where the condition enabling the vendor to rescind does not expressly provide for notice being given to the purchaser of intended rescission if the requisition is persisted in.

(*b*) Sug. 352.
(*c*) *Newall* v. *Smith*, 1 J. & W. 263.
(*d*) *Allen* v. *Martin*, 5 Jur. 239.
(*e*) 29 Ch. D. 626.
(*f*) 53 L. T. 434.
(*g*) *Ante*, p. 182.

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Danger of withholding objections, &c.,—whether it amounts to waiver.

As to costs.

And, on the other hand, a purchaser should be careful not to hold back important objections or requisitions: if he knowingly do so, the question may arise whether he has not impliedly waived them (*h*); and where a purchaser puts a vendor to expense in complying with requisitions, &c., and then takes and insists on a fatal objection, which he originally had the means of discovering, it seems probable that if an action were brought by the vendor for specific performance and dismissed, the Court would not dismiss it with costs, and would even allow to the vendor, by way of set-off, the expenses so incurred by him (*i*); although it does not appear that he could otherwise recover them (*j*).

As to requiring concurrence of other parties.

And though it is not, perhaps, absolutely necessary that a purchaser's original requisitions should go beyond matters arising out of the title as abstracted, it is always desirable that he should, in the first instance, make any requisition which he considers of importance as to the special form of the conveyance, or as to the concurrence therein of parties other than the vendor. In one case (*k*), it appears to have been considered, though it was not necessary to decide the point, that if the purchaser insists on a requisition as to matter of conveyance which the vendor refuses to comply with, and the purchaser on this ground, after due notice, rescinds the contract, the Court cannot, if the requisition

(*h*) See Lord St. Leonards' remarks on *Magennis* v. *Fallon*, V. & P. 347; and *Stanton* v. *Tattersall*, 1 S. & G. 529; *Alexander* v. *Crosby*, 1 J. & L. 666. Where a purchaser made frivolous objections, and the vendor brought an action for specific performance, the purchaser was held to be entitled in his answer to the bill to raise an entirely new objection; *Gray* v. *Fowler*, L. R. 8 Ex. 249. And where judgment is given for specific performance of a contract for sale, and an inquiry is directed in general terms whether the vendor can make a good title, it means a good title according to the terms of the contract; but if the vendor wishes to prevent objections which have been waived before the action from being renewed under the inquiry, the point must be considered at the hearing and noticed in the judgment; *Upperton* v. *Nicholson*, 6 Ch. 436.

(*i*) See and consider *Deverell* v. *Lord Bolton*, 18 V. 505, 514, 515; *Corbett* v. *Commissioners of Works*, 16 W. R. 889.

(*j*) See Sug. 363, and *vide infrà*.

(*k*) *Denny* v. *Hancock*, 6 Ch. 1; see p. 13.

is well founded, enforce specific performance at the suit of the vendor.

Requisition for judicial construction of will.

In a very recent case it has been decided that a requisition that the vendor should at his own expense obtain a judicial construction of an ambiguous will, on which his title is founded, is an admissible requisition; if the construction is against the vendor he will have to pay the costs (*l*).

Purchaser's *primâ facie* right to a good title.

We have already considered (*m*) what expressions will negative the purchaser's *primâ facie* right to a marketable title: he will, however, be bound, not only by express stipulation, but also by a clear notice of the state of the title given to him before entering into the agreement (*n*).

May be waived.

But a purchaser, may, after the contract, either expressly or impliedly, waive, either wholly or in part, his right (whether it be absolute or qualified) to a marketable title, or to the usual evidences thereof.

Purchaser not bound by counsel's opinion, unless he adopt it.

We have seen that a purchaser is not bound by his counsel's approval of the title; but that if counsel waive a requisition or objection, the purchaser, adopting his opinion and dealing with the vendor on that view, cannot afterwards repudiate it (*o*).

Effect of acceptance of title subject to specified requisition.

Where a purchaser, having taken several objections, expresses himself willing to accept the title upon a specified objection being removed, this waiver of the other objections is merely conditional upon the removal of the specified objection; so that, if such objection be not removed and an action be commenced against him for specific performance, he is entitled to a general reference as to title (*p*); and although the objection taken by the purchaser may not be his true reason for refusing to complete the purchase, the Court will not pry into his motives, but will simply decide

(*l*) *Re Hall and Chapman*, 54 L. J. Ch. 595.

(*m*) *Ante*, p. 163 *et seq.*

(*n*) *Ogilvie* v. *Foljambe*, 3 Mer. 64.

(*o*) *Ante*, p. 350.

(*p*) *Lesturgeon* v. *Martin*, 3 M. & K. 255; *Sweet* v. *Meredith*, 8 Jur. N. S. 638; 3 Giff. 610, where the judgment is very inadequately reported.

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Acceptance of title as abstracted not a waiver of the right to have it verified.

whether the objection is tenable or not (q). Acceptance of the title, as abstracted, is no waiver of the purchaser's right to have the abstract verified (r): nor will the Court imply a waiver of any objection which is not clearly raised by the contents of the abstract (s): nor does a purchaser, by waiving his right to an abstract, necessarily waive objections to the title which are otherwise known to him (t); nor does acceptance of the title bind the purchaser, where the vendor conceals some material fact (u). Where a purchaser of a freehold and copyhold estate accepted the title, subject to the production of "a declaration of identity of lands mentioned in the deeds to those now sold," this was held to be a waiver of his original right to have the tenure of a particular part distinguished (x); and where a purchaser, in his answer to a suit for specific performance, admitted his belief that at the date of the contract the vendor had a title, this was treated as an admission of the fact, which he could not afterwards question (y).

Waiver may be implied:—

And waiver need not be expressed: it may be implied from either letters or mere acts of the party.

From apologies for non-payment.

For instance, where a purchaser who had been let into possession—but which, as it was according to the contract, does not appear to be very material—and who had retained the abstract for a considerable period without objection, and had altered and let the premises, wrote a letter to his solicitor for the purpose of its being communicated to the vendor, and therein expressed his "vexation at the delay which had happened about payment," and his gratification "at the liberality and patience shown" to him, this was held to

(q) *Denny* v. *Hancock*, 6 Ch. 1, 10.

(r) *Southby* v. *Hutt*, 2 M. & C. 217.

(s) *Blacklow* v. *Laws*, 2 Ha. 47, *A.-G.* v. *Sitwell*, 1 Y. & C. 570; *Bentley* v. *Crasen*, 17 B. 204; *Turquand* v. *Rhodes*, 37 L. J. Ch. 830.

(t) *Sidebottam* v. *Barrington*, 3 Jur. 947.

(u) *Bousfield* v. *Hodges*, 33 B. 90.

(x) *Dawson* v. *Brinckman*, 3 M. & G. 53.

(y) *Phipps* v. *Child*, 3 Dr. 709.

From payment for, and dealing with property.

From retention of the abstract without making requisitions

amount to an admission that the title was approved (z): and the same decision was come to in a later case, where a purchaser took possession under the contract, paid part and gave security for the residue of the purchase-money, and mortgaged her interest under the contract (a). So where a purchaser had been in possession of the estate, and had retained the abstract for five months without making any requisition as to title, and then, while under notice by the vendor to complete within fourteen days, merely required the production of the deeds, he was, under the special circumstances, held to have thereby accepted the title as abstracted (b).

Approval of preparation of conveyance, when a waiver.

The preparation of the conveyance cannot, in general, be much relied on as evidence of waiver (c): where, however, in the case of a lease, the lessee, without previously requiring a title to be shown, approved of a draft lease furnished by the lessor, and took possession under the contract, he was held to have waived all objections to the title (d); but this is not so where there has been a common mistake (e). Where a purchaser of a leasehold house, after transmission to him of the original lease, prepared a draft assignment, and made various objections as to repairs and other matters, but did not require the production of the lessor's title, the Court seems to have considered that he had waived its production (f): so, where requisitions on the title were made and answered, and the purchaser sent to the vendor the draft conveyance without prejudice to the requisitions, it was held that the purchaser, having taken no objection to the vendor's replies, and the only negotiation pending between the parties being as to the payment of the purchase-money, must be deemed to have

(z) *Margravine of Anspach* v. *Noel*, 1 Mad. 310. But see and distinguish *Cooch* v. *Walden*, 46 L. J. Ch. 639.

(a) *Haydon* v. *Bell*, 1 B. 337.

(b) *Pegg* v. *Wisdon*, 16 B. 239; *vide ante*, p. 189.

(c) See Sug. 345, *Burroughs* v. *Oakley*, 3 Sw. 159; *Harwood* v. *Bland*, Tl. & K. 510.

(d) *Warren* v. *Richardson*, You. 1; and see *Simpson* v. *Sadd*, 4 D. M. & G. 665.

(e) *Jones* v. *Clifford*, 3 Ch. D. 779.

(f) *Clare* v. *Beaumont*, 1 De G. & S. 397, *Smith* v. *Capron*, 7 Ha. 191.

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accepted the title (*g*); subject, of course, to the requisitions being complied with, so far as the vendor, by his replies, had agreed to comply with them. It may be observed, however, that execution of the conveyance is by itself no waiver of a claim for compensation, where the purchase-money has been paid into Court (*h*).

Conditional waiver.

At any rate, where the purchaser prepares and tenders the draft conveyance, this cannot, as a general rule, amount to waiver of objections on the title, except conditionally upon the vendor's acceding to the proposed form of conveyance (*i*).

Attempt to resell.

The fact of an intended lessee having advertised the property for sale, although not considered conclusive, was relied on in a modern case, as one among other evidences of his having waived the production of the lessor's title (*k*); but, in general, no great importance as regards waiver can be fairly attached to the mere circumstance of the purchaser having attempted to resell the property; except that the actual or attempted resale of merely a *portion* of the estate, may, as between the original vendor and purchaser, show that the latter did not consider such portion material to the enjoyment of the residue (*l*). Where the purchaser has actually contracted to resell, or has published conditions with a view to a resale, the form of the contract or conditions may be material: as it may be fairly presumed that he can neither have intended on the one hand to insist as against the original vendor upon any objections, which he may have guarded against on the resale, nor on the other hand to waive any to which the title would then remain liable. If, under the sub-contract or conditions, the sub-purchaser is to be bound to take the title as it stands, this would, it is conceived, be strong

(*g*) *Sweet* v. *Meredith*, 8 Jur. N. S. 637.

(*h*) *Perriam* v. *Perriam*, 32 W. R. 369.

(*i*) *Lukey* v. *Higgs*, 1 Jur. N. S. 200.

(*k*) *Simpson* v. *Sadd*, 4 D. M. & G. 665.

(*l*) See *Knatchbull* v. *Grucber*, 1 Mad. 170; 3 Mer. 124; *Jones* v. *Clifford*, 3 Ch. D. 779.

evidence that the original purchaser had waived all his objections to the title.

Possession: Possession of the property by the purchaser is the fact most frequently relied on as furnishing evidence of waiver of objections to the title (*m*): its importance, however, depends upon the circumstances attending its acquisition and retention.

taken after delivery of abstract. Where the possession is taken after the delivery of the abstract, and not in pursuance of any special provision of the contract, it is *primâ facie* a waiver of all objections appearing on the abstract; and it lies on the purchaser to rebut this presumption (*n*).

Forcible possession. The strongest case against the purchaser is, where he forcibly, or without the consent of the vendor, and without being authorized by the contract so to do, takes possession: forcibly taking possession was held in an early case to amount to a waiver of an objection for want of title to an important part of the estate (*o*), though compensation appears to have been allowed.

Possession taken under contract, or with vendor's leave. Possession, however, if taken in accordance with the clear intention of the parties, as evidenced by the terms or subject-matter of the contract (*p*), or with the consent of the vendor (*q*), is not in itself, as a general rule, any waiver of the purchaser's right to a good title, or of any pending negotiations upon the title: where, however, the purchaser was, upon his own application, let into possession, this was held to be a waiver of an objection (*viz.*, a right of sporting

(*m*) *Fludyer* v. *Cocker*, 12 V. 25, 27; *Fleetwood* v. *Green*, 15 V. 591; *Banks* v. *Lord Rokeby*, 2 Sw. 222, 226; *Haydon* v. *Bell*, 1 B. 337; *Deller* v. *Simonds*, 5 Jur. N. S. 997.

(*n*) *Bown* v. *Stenson*, 24 B. 631; *Gloag and Miller's Contract*, 23 Ch. D. 320.

(*o*) *Calcraft* v. *Roebuck*, 1 V. 221.

(*p*) *Dixon* v. *Astley*, 1 Mer. 134; *Stevens* v. *Guppy*, 3 Rus. 171; *Belton* v. *London School Board*, 7 Ch. D. 766.

(*q*) *Vancouver* v. *Bliss*, 11 V. 458, 464; *Burroughes* v. *Oakley*, 3 Sw. 159; *Simpson* v. *Sadd*, 4 D. M. & G. 665.

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over the property) which appeared upon the face of the abstract delivered three months previously, but which had not been made the subject of remark by the purchaser or his solicitor (*r*). It is material here to observe, first, that the purchaser's general requisitions upon the title appear (*s*) to have been made prior to the application for possession; and secondly, that the objection was of a permanent character, and not probably capable of removal: the case may, perhaps, be held to show that the acceptance of possession amounts to an implied waiver of any known objection, which the purchaser knows, or may reasonably believe, cannot be removed; or has not formed part of his previous requisitions upon the title (supposing any requisitions to have been already made). In a later case, the taking of possession, though held to be a waiver of all objections appearing on the abstract, did not preclude the purchaser from objecting to the title upon grounds which subsequently came to his knowledge *aliunde* (*t*); so, also, it was held to be no waiver, where there was a serious misdescription of the property, not discovered until after possession was taken (*u*).

Long retention of possession.

Where purchasers retained possession for two years, without requiring an abstract, which, according to the agreement, was to be paid for by themselves, if required, this was held to be a waiver of their right to investigate the title (*v*). And where a purchaser has taken possession of, and enjoyed the subject-matter of, the contract, the Court will, as against him, make every presumption in favour of the validity of the contract (*y*).

What amounts to possession.

The grant of a lease by the purchaser to a tenant in possession is equivalent to taking possession (*z*): so is acceptance of the keys of a house (*a*).

(*r*) *Burnell* v. *Brown*, 1 J. & W. 168.

(*s*) See *ibid.* 171.

(*t*) *Boun* v. *Stinson*, 24 B. 631.

(*u*) *Turquand* v. *Rhodes*, 37 L. J. Ch. 830.

(*v*) *Sibbald* v. *Lowrie*, 18 Jur 141; *Wallis* v. *Woodyear*, 2 Jur. N. S. 179.

(*y*) *Port of London Assurance case*, 5 D. M. & G. 465.

(*z*) *Ex p. Sidebotham*, 1 M. & A. 655.

(*a*) *Guest* v. *Humfray*, 5 V. 823.

Distinction between purchase of leaseholds and of freeholds.

And, as it is not so usual to require the lessor's title on the grant of a lease as it is to require the title on the purchase of freeholds, smaller circumstances may satisfy the Court that the right has been waived in the former case than would be sufficient to induce the same conclusion in the latter (*b*); and the same principle would apparently apply to the case of a purchase of leaseholds in cases not within the Vendor and Purchaser Act, 1874, or the Conveyancing Act, 1881.

Undertaking by solicitor to perfect title.

Lastly, we may remark that a personal undertaking by the vendor's solicitor to do certain acts for clearing up the title, will not be enforced by the Court under its summary jurisdiction (*c*).

Section 3.

General rights and liabilities of purchaser in possession.

(3.) *As to the general rights and liabilities of a purchaser in possession* (*d*).

Where the purchaser is already in possession as tenant at will the purchase contract puts an end to the tenancy (*e*); and even in the case of a purchaser being tenant for a term of years, it has been said that the relation of landlord and tenant is determined by a contract between the parties for the sale of the estate (*f*). But at Law a lease is not affected by a contract which depends upon a good title being deduced (*g*); and it is conceived that where a purchaser, who is in possession as tenant, and entitled to require a valid title, acts pending the completion of the purchase merely as he might properly have done if the tenancy were still subsisting, his possession will not be deemed an acceptance of the title.

Purchaser authorized to enter into

It appears to be clear that a purchaser who is authorized to enter into possession of the estate, may, to some extent,

(*b*) *Simpson* v. *Sudd*, 1 D. M. & G. 665.

(*c*) *Peart* v. *Bushell*, 2 Si. 38.

(*d*) *Et vide post*, Ch. XVII. s. 2.

(*e*) *Daniels* v. *Davison*, 16 V. 252, 253.

(*f*) *S. C.*, *sed quære.*

(*g*) *Doe* v. *Stanion*, 1 M. & W. 695, 701; *Tarte* v. *Darby*, 15 M. & W. 601; Sug. 178.

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[illegible] and acting as owner does not [illegible] objection.

act as owner without thereby accepting the title. He may take a fall of underwood in due course (h): so, in the case of a timber estate, a fall of timber would, it is conceived, be no necessary acceptance of the title, although it might be restrained at the suit of the vendor upon the ground of it diminishing his security for the purchase-money (i): nor does it appear that any act of management of the estate in a due course of husbandry, or in a fair exercise of the supposed right of ownership (k), would be of importance: thus it has been held that, upon a purchase of four acres of land, stubbing up an [illegible] bed of nine perches, levelling the land, and filling up a pond, did not amount to a waiver of title (l).

As to altering property.

Whether universally so.

In fact, Lord St. Leonards states without qualification (m), that "acts of ownership after an authorized possession are of no importance:" the reported cases, however, do not seem to support [illegible] a proposition; nor can it be maintained upon principle. If the purchaser of a residential property, let into possession pending the investigation of the title, were to fell the ornamental timber, or were otherwise to destroy or permanently alter for the worse any of those features of the estate, which conferred upon it an adventitious value, it cannot be supposed that, at the present day, the Courts would allow him to get rid of his bargain upon the ground of the title being not strictly marketable.

Whether so after discovery of defect in title.

At any rate, it appears that a distinction must be made between important acts of ownership committed previously to, and those committed after, the discovery of a serious objection to the title (n); for acts which materially affect the property are justifiable only under the purchaser's belief that

(h) [illegible] v. [illegible], 3 Sw. 170 [illegible], p. [illegible]

(i) [illegible] v. [illegible], [illegible]

(k) [illegible] v. [illegible], [illegible] C. C. 116 [illegible] whether the result would have been [illegible] the defect, and that it was irremediable: see p. 50[illegible], post.

(l) [illegible] v. [illegible], Jac. 165, [illegible] Wadley v. Woodyear, 2 Jur. N. S. 17[illegible].

(m) [illegible] v. Ashley, 1 Mer. 135.

he is in fact the owner. And it is conceived that a purchaser in possession may so act as to preclude himself from ultimately rejecting the title, without necessarily waiving his right to have the title perfected to the best of the vendor's ability; and also that a distinction must generally be made between acts affecting residential or building property and acts affecting mere agricultural land.

Retention of possession and refusal to discuss the title.

And where a purchaser, who had been long in possession of the property, and had taken frivolous objections to the title, refused to receive any further explanations, and yet retained possession, he was held to have accepted the title (*p*).

Waiver of objections but not of compensation.

An act which amounts to a waiver of the purchaser's right to reject a defective title, is not necessarily a waiver of his right to compensation for the defect (*q*).

Modification of waiver.

So, acts by a purchaser in possession, which might otherwise have been considered as a waiver of objections to the title to a portion of the estate, have been held to be modified by his continuing to ask for the title (*r*).

Purchaser rejecting title may be ejected without compensation for expenditure.

A purchaser may (*s*), and as a matter of prudence should, decline to take possession while the title is in dispute, except under a special agreement: for, if he take possession and then reject the title, he may be ejected by the vendor (*t*); and cannot at Law claim any allowance for improvements or repairs; nor will Equity afford him any relief unless there has been fraud on the part of the vendor (*u*). Upon taking

(*p*) *Hall* v. *Lucer*, 3 Y. & C. 196.

(*q*) *Calcraft* v. *Roebuck*, 1 V. 221; *Hughes* v. *Jones*, 3 D. F. & J. 307, 316. The clerk of the vendor's solicitor has no implied authority to bind the client to allow compensation; *Barnell* v. *Brown*, 1 J. & W. 168.

(*r*) See 1 Mad. 170; *Knatchbull* v. *Grueber*, 3 Mer. 124. And see as to the taking of possession being an act of part performance of the contract, *post*, p. 1136.

(*s*) *Fortablow* v. *Shirley*, 2 Sw. 223.

(*t*) And the agreement will amount to an acknowledgment of the vendor's title; *Doe* v. *Burton*, 16 Q. B. 807.

(*u*) Sug. 347; *Nicloson* v. *Wordsworth*, 2 Sw. 365.

possession, he becomes, in the absence of any special agreement (*x*), tenant at will to the vendor, although there is a stipulation for payment of interest until completion (*y*); and the right of the vendor to recover possession by ejectment will be subject to the 7th section of 3 & 4 Will. IV. c. 27 (*z*). When a purchaser in possession under the contract is advised to rescind the contract, and assert a paramount title to the property, he is not bound to give up possession before asserting such paramount title by making a formal entry (*a*).

What allowances made when vendor sues in Equity for repairs, improvements, &c.

If the contract be rescinded in Equity, even on the ground of fraud in the purchaser (*b*), the Court will, in general, direct an allowance to be made to the purchaser for substantial improvements and repairs (*c*): this allowance, however, when the sale is set aside at the suit of the purchaser, will not extend to improvements, or even repairs—except such as are essential to the preservation of the property (*d*)—made subsequently to the discovery of the matter on which he grounds his right to relief; nor to a greater extent than is specifically asked for (*e*).

Purchaser not liable for use and occupation, if title bad, until it is rejected.

On the other hand, it has been decided, that, where the title proves defective, an action for use and occupation will not lie against the purchaser for the time during which he has been in possession under the contract (*f*): but if, after the contract is clearly abandoned, he retain possession, he will be liable in respect of such subsequent occupation (*g*).

(*x*) *Saunders* v. *Musgrave*, 6 B. & C. 524.

(*y*) *Doe* v. *Capperton*, 9 C. & P. 112; *Doe* v. *Chamberlaine*, 5 M. & W. 14; *Doe* v. *Jackson*, 1 B. & C. 448; *Doe* v. *Leeds R. Co.*, 16 Q. B. 796; *Doe* v. *Nesbitt*, 3 Man. & G. 271 (case of exchange). As to what will determine the tenancy, see 4 Jarm. Conv. 466; the tenancy at will is determined by a mere rescission without any demand for possession; *Markey* v. *Coote*, 10 I. R. C. L. 149.

(*z*) *Doe* v. *Beck*, 4 Man. & G. 30; *ante*, p. 442.

(*a*) *Southcomb* v. *Bp. of Exeter*, 6 Ha. 213.

(*b*) *Donovan* v. *Fricker*, Jac. 165; *Nesom* v. *Clarkson*, 4 Ha. 164.

(*c*) Sug. 254.

(*d*) *Ibid.*

(*e*) See *Edwards* v. *M'Leay*, 2 Sw. 287.

(*f*) *Winterbottom* v. *Ingham*, 7 Q. B. 611; *Kirtland* v. *Pounsett*, 2 Taun. 145; *Seaton* v. *Booth*, 4 A. & E. 528.

(*g*) *Howard* v. *Shaw*, 8 M. & W. 118; *Markey* v. *Coote*, 10 I. R. C. L. 149.

Where a purchaser retained possession for eight years, without payment, and refused either to accept the vendor's defective title, or to abandon the agreement, and upon a bill being filed by the vendor, and the master reporting against the title, still refused to accept it, he was ordered to account for the rents and profits and to pay the costs of the suit (*h*).

Purchaser may maintain use and occupation in respect of his equitable title, when.

Where C., a sub-purchaser from B., entered into possession, and then, pending a suit for specific performance by B. against A. (the original vendor), was induced by A. to give up possession under a mistake of facts, it was held that, upon a decree being made for specific performance of the contract between A. and B., and a conveyance being executed by A., C. could maintain use and occupation for the time during which he had been out of possession (*i*); but it appears to have been subsequently held in the same case, that although the equitable owner might maintain use and occupation under the circumstances, yet such action would not lie against the vendor, because the relation of landlord and tenant was never contemplated between the parties (*k*).

Liability of purchaser in respect of alteration of premises.

Where a contract was rescinded upon the ground of fraud in the purchaser, the latter was compelled to reinstate a private house which he had converted into a shop (*l*): the *fraud* is not noticed by Lord St. Leonards, in stating the case (*m*); and if, as may therefore be supposed to be his opinion, this was not the ground of the decision, the decision seems to be an authority for this very reasonable proposition, *viz.*: that alterations by the purchaser, although not in themselves a waiver of title, will yet deprive him of the aid of a Court of Equity in rescinding the contract, if they are such as change the nature or character of the property, and do not

(*h*) *King* v. *King*, 1 M. & K. 442; *Hope* v. *Hope*, 22 B. 365.

(*i*) *Hull* v. *Vaughan*, 6 Pr. 157; and see *Winterbottom* v. *Ingham*, 7 Q. B. 617.

(*k*) *Ib.* 618; *Tew* v. *Jones*, 13 M. & W. 12; *Turner* v. *Cameron's Co.*, 5 Ex. 932.

(*l*) *Donovan* v. *Fricker*, Jac. 165.

(*m*) Sug. 254, 255.

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adult of a bona-fide purchaser; or if he declines or is unable to reinstate them.

Lien on estate for purchase-money paid.

If the contract be rescinded through want of title or other default on the part of the vendor, the purchaser, if he have paid all or any part of the purchase-money, will have a lien for it, with interest (*n*), on the estate, even although he may have taken an independent security (*o*), and also for his costs of suit (*p*): but no such right exists where the contract is void on the ground of illegality (*q*); or where the purchaser is by Law disqualified from holding such an interest in real estate (*r*); or where he himself abandons the contract (*s*). A person, who has paid purchase-money under a *bonâ fide* mistaken belief that he is entitled to the benefit of the contract, has a lien on the property, in the hands of the person rightfully entitled, for the money paid by him under the mistake (*t*).

Where the vendor of an estate contracted to be sold executed a mortgage upon it, of which notice was duly given to the purchaser by the mortgagee, who did not interfere with the contract, and the purchaser, who was allowed to take and retain possession, paid several instalments of the purchase-money as provided by the contract, but eventually (on grounds which were adjudged sufficient) rejected the title, it was held that the purchaser had a lien upon the estate for the payments made and interest, which might be enforced against the mortgagee (*u*). If before completion the purchaser has

(*n*) *Lowndes* v. *Lane*, 2 Ch. 118.

(*o*) *Lee* v. *Muggeridge*, 3 Atk. 1, 4; *Meredith* v. *Sayers*, 15 V. 345; *Oldham* v. *Litchfield*, 7 Ves. Jun. 502; *Burrows* v. *Walls*, 4 Ed. 411; *Wilson* v. *Ivy*, 3 De G. & Sm.

(*p*) *Wilkinson* v. *Wilkinson*, 2 H. & M. 233; *Turner* v. *Morgan*, 8 Eq. 744; *Hanson* v. *Keating*, 8 Eq. 120; *Tarrant* v. *Ebbs*, [illegible]

(*q*) *Tenny* v. *Otterbourne*, 2 M. & C. 55, 58.

(*r*) See and consider *Harrison* v. *Stewart*, 2 V. Sen. pp. 389, 393; *Meredith* v. *Sayers*, 15 V. at p. 507.

(*s*) *Ivey* v. *Grant*, 5 De G. & S. 151.

(*t*) *Mathison* v. *Clyde*, 1 J. & H. 470, and see *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1.

(*u*) *Rose* v. *Watson*, 10 H. L. C. 672.

resold, the sub-purchaser will have a lien for any money paid by him upon whatever interest the purchaser may possess in the property (*x*).

(4.) *Vendor in possession, by altering property, avoids the contract.*

Section 4. Vendor in possession, by altering property, avoids the contract.

Any alteration of the subject-matter of the contract by the vendor, in any particular which does not admit of compensation or reinstatement, as the cutting of ornamental timber (*y*) or other trees, will entitle the purchaser to abandon the contract. The felling of ordinary timber by the vendor pending the completion of the contract may be a matter for compensation (*z*): and, as we have already seen, a vendor may, in due course of husbandry, cut coppice wood and get in crops, but in such a case the net profits will belong to the purchaser (*a*).

Material alteration of property by vendor may avoid contract.

And in a case between vendor and purchaser the Court, it is conceived, would consider whether the trees destroyed were in fact, or might reasonably be considered, ornamental; and would not—as in cases between tenant for life and remaindermen—regard as ornamental only trees which were planted or left for ornament (*b*).

Felling ornamental timber.

We (*c*) have already considered the relative rights of the vendor and purchaser in the several events of the estate increasing or diminishing in value, or of the failure of the consideration for, or subject-matter of, the contract, before conveyance.

Alterations in value of estate, or failure of consideration.

(*x*) *Aberaman Ironworks* v. *Wickens*, 4 Ch. 107.

(*y*) *Magennis* v. *Fallon*, 2 Moll. 588.

(*z*) *S. C.*

(*a*) *Poole* v. *Shergold*, 1 Cox, 273, and *vide ante*, p. 286.

(*b*) See *Magennis* v. *Fallon*, *supra*; *Marker* v. *Marker*, 9 Ha. 1; *Webster* v. *Donaldson*, 31 B. 511. As to the measure of damages where a vendor has altered the property, and the purchaser still seeks specific performance, see *Kichl* v. *Park*, 31 L. T. 325.

(*c*) *Ante*, p. 284 *et seq.*

Chap. X.

Sect. [illegible] *Entry upon land by railway company before completion of purchase.*

Act [illegible] only [illegible] for [illegible] purposes.

A contractor employed by railway companies.

By the clauses of the Land Clauses Consolidation Act, 1845, which relate to the entry upon land by the promoters of the undertaking (*t*), it is, in effect, provided, that the promoters shall not, without the consent of the owners (that is, all persons having any interest, although not in possession, (*u*)) and occupiers, enter upon any land (except for the purpose of making surveys and other similar purposes specified in the Acts) until they have paid or deposited the purchase-money or compensation for the same. If, however, before the amount of purchase-money or compensation has been determined by agreement, award, or a verdict, they are desirous of entering, they are enabled to do so, upon making such deposit and giving such bond by way of security as are specified in the 85th section of the 8 & 9 Vict. c. 18, as recently modified by the 26th section of the 30 & 31 Vict. c. 127 (*v*). The valuation to be made by the surveyor appointed under the provisions of these Acts is to include the amount of all damage and injury, so far as capable of estimation (*w*); and the security must be for the value of *all* the land comprised in the notice of purchase given by the promoters under the 18th section, although the proposed entry be upon only a part of such land (*x*); and should be in the very terms of the Statute (*y*); and if the bond first given be

Upon making deposit, and giving security by bond.

(*t*) Sections 84 to 92.

(*u*) *Ex parte Lancashire & Yorkshire R. Co.*, 3 De G. M. & G. 108.

(*v*) The bond given under this section is to cover the purchase-money or compensation for the particular land (*x*) and does not include any possible compensation for minerals under sections 74 and 81, even although the arbitrator employed has to assess the amount of compensation for minerals. *Ex parte Nicholson & Lancashire & Yorkshire R. Co.*, 2 Ch. D. 261. As to what it does include, see *Ex parte Cameron*, [illegible] *R. Co.*, 7 Eq. 106. As to the principle upon which the amount of the deposit is to be calculated in a [illegible] *Hull v. M. R. Co.*, 21 Ch. D. 11.

(*w*) 8 & 31 Vict. c. 127, s. 26.

(*x*) *Ex parte* [illegible] *N. S. R. Co.*, 2 De G. & S. [illegible], *Hedley v. Ludlow*, 3 L. [illegible], *Ex parte* [illegible] *N. W. R. Co.*, 3 De G. & S. 411.

(*y*) *Lewis v. G. N. R. Co.*, 2 Ph. 539, *Loughborough v. G. N. R. Co.*, 1 De G. & S. 480, *Willows v. S. E. R. Co.*, 1 M. & G. 58, *Clay v. Metr. R. Co.*, 10 Jur. N. S. 1011. The provision as to

informal, or insufficient, a second may be substituted for it (k). Before the recent Statute, no prior notice to the landowner of the intention of the promoters to proceed under the 85th section of the Lands Clauses Consolidation Act appears to have been necessary (l); but now, by the 30 & 31 Vict. c. 127, s. 36, the company are bound to give to any party interested in, or entitled to sell and convey, the lands in question, and not consenting to the entry of the company, not less than seven days' notice of their intention to apply to the Board of Trade for the appointment of a surveyor (m): such a notice, however, does not amount to a contract binding them to take the property (n). The entry and deposit may be made at any time before the expiration of the period allowed for compulsory purchase (o). Where a company has entered, under section 85, before the expiration of such period, they may continue to hold the land afterwards (p); and a company which during such period has given a notice to treat may enter after it has expired (q); but an entry subsequent to the recent Statute cannot be made upon a previous valuation under the Lands Clauses Act (r): nor are the company justified in proceeding under the 85th section of that Act, unless there is an urgent necessity for immediate entry on the land (s); and if they avail themselves of their powers under this and the following sections, they cannot also enforce specific performance of an *agreement* previously entered into

sureties to the bond has been altered by s. 36 (1) of 30 & 31 Vict. c. 127, in cases where the parties differ, see *Tiverton* v. *Tiverton R. Co.*, 22 Ch. D. 25, 2.

(k) *Wiley* v. *S. E. R. Co.*, 1 M. & G. 58.

(l) *Bridges* v. *Wilts & W. R. Co.*, 4 R. C. 622.

(m) Prior to the recent Act, the appointment rested with two justices.

(n) *Grierson* v. *Cheshire Lines' Committee*, 19 Eq. 83.

(o) *Worsley* v. *S. D. R. Co.*, 16 Q. B. 539.

(p) *Dee* v. *N. S. R. Co.*, 16 Q. B. 525.

(q) *Marquis of Salisbury* v. *G. N. R. Co.*, 17 Q. B. 840; and see generally on the section, *Tiverton R. Co.* v. *Tiverton*, 9 Ap. Ca. 480, which finally decides that, whether or not the railway can be completed within the prescribed period, an entry under this section is lawful at any time within it, and that the company may remain upon the land and finish the making of the railway after the expiration of the period.

(r) *Field* v. *Carnarvon R. Co.*, 5 Eq. 190.

(s) *S. C.* But see *Wiley* v. *S. E. R. Co.*, 1 M. & G. 58.

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with respect to the [illegible] lands (*a*); the service of a notice to treat and entry into possession under the 85th section being regarded as an abandonment by the company of their rights under the contract. It is conceived that if the company, having entered into a binding contract for the purchase of land, afterwards put in force their compulsory powers with respect to the same land, the landowner may, at his option, either enforce the contract, or allow the price to be determined by a jury or by arbitration, as he may deem most to his advantage. The rules, applicable to the operation of this section, extend also to streams taken by a Waterworks Company (*b*): as also to the powers given under various other Acts which incorporate the Lands Clauses Consolidation Act (*c*).

Application, &c., of deposit

The deposit is to remain as a security for the performance of the bond, and is to be applied under the direction of the Court of Chancery (*d*); and it will not generally be paid to the company without notice to the landowner, although the purchase may have been completed by agreement, and the purchase-money paid (*e*); and he is entitled to his costs of appearance (*f*): he does not, however, seem to have any lien upon it for his costs payable by the promoters (*g*): nor can he oppose its repayment to the company, if he have repudiated

(*a*) *Bristol R. Co. v. Wood*, 2 J. & H. 710.

(*b*) [illegible]

(*c*) See *Wood v. Middleton*, [illegible]

(*d*) S. 87. "If the owner of the land is by reason of legal incapacity or any other cause, or if the landowner may present a petition of appointment of a guardian adverse to the company, *Re Macon's Lands*, 10 Ch. D. 181. Where the amount of the deposit does not exceed 1,000*l.*, the application must now be made by summons in Chambers, R. S. C. 1883, O. [illegible], r. 2. [illegible] *Re Macon's Lands*, 26 Ch. D. 208.

(*e*) [illegible]

(*f*) The consent in writing of the landowner to the payment of the purchase-money is sufficient, *Re Metropolitan Railway Co.*, 10 L. T. 750; and the fact of the land being in the possession, and produced by, the promoters is sufficient evidence of the fulfilment of the conditions of the bond, *Re L. & N. W. R. Co.*, 26 L. T. 687. If the application is not made until many years after conveyance to the company, service may be dispensed with, *Re L. & F. R. Co.*, 55 L. T. 68.

(*g*) See *Re Stone*, 2 Ph. 772; see, however, *R. v. Tottenham R. Co.*, 14 W. R. 669.

Re Stone, 2 Ph. 772.

the proceedings of which the original deposit, &c., formed a part (*a*). The fund is not available for the payment off of a mortgage on the lands (*b*); the principle being that, upon fulfilment of the condition of the bond, the promoters are entitled to payment out without any deduction (*c*).

Entry, what is.

It has been held that the making of a permanent tunnel through the soil without disturbing the surface, is an entry upon or user of the land within the 85th section of the Lands Clauses Consolidation Act (*d*); so also is throwing an arch over the land (*e*). Placing waggons, rails, &c., on the land, with the consent of the tenant, has been held to be no entry (*f*): but if permanent injury is done, though the entry is with the tenant's consent, yet the owner may obtain an injunction (*g*). Where the entry was merely for surveying and setting out the line, and the company were no longer in possession, the Court refused an injunction (*h*).

Where land in mortgage, deposit should cover enforceable claims of mortgagee.

Where the land is in mortgage, the deposit and bond should be sufficient to cover all claims which the mortgagee may be entitled to enforce; and in one case where the company had notice that land was subject to a mortgage, not payable till a future day, and paid the purchase-money into Court upon the ordinary valuation to the credit of the mortgagor, without communicating with the mortgagee, they were restrained from proceeding with their works, though not from retaining possession of the land (*i*): so where equitable mortgagees

(*a*) *Re Fords*, 2 M. & G. 377.

(*b*) *Martin* v. *L. C. & D. R. Co.*, 1 Ch. 501.

(*c*) *Re North & Lincoln R. Co.*, 9 Ch. 263.

(*d*) *Ramsden* v. *Manchester & Altrincham R. Co.*, 1 Ex. 723; and easements generally are within the section where there is express power to take them; *Hall* v. *M. R. Co.*, 21 Ch. D. 143, 147.

(*e*) See *Pinchin* v. *Blackwall R. Co.*, 1 K. & J. 35.

(*f*) *Standish* v. *Mayor, &c. of Liverpool*, 1 Dr. 1.

(*g*) *Armstrong* v. *Waterford & Limerick R. Co.*, 10 Ir. Eq. R. 60.

(*h*) *Fooks* v. *Wilts, S. & W. R. Co.*, 5 Ha. 199.

(*i*) S. 108; *Ruaken* v. *E. & W. India Docks R. Co.*, 12 B. 298; but see *Williams* v. *S. W. R. Co.*, 3 De G. & S. 354, where no difficulty appears to have been felt as to the jurisdiction to restrain the company from keeping possession.

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were not formally served with notice of the inquiry to assess damages, and took no part in it, and the amount of compensation awarded fell short of what was due on their security, it was held that they were in no way bound; and that, in default of payment, they were entitled as against the company and the landowner to a conveyance of the land comprised in their security (l).

Where land claimed under an adverse title.

But where a person claims under a title altogether adverse to that of the parties with whom the company have contracted, Equity will not interfere, at his suit, to restrain the company from committing waste (m): in such a case the adverse claimant should bring an action of trespass or ejectment.

Penalty on unlawful entry.

Any wilful entry by the promoters, without consent and before payment or deposit, is made the subject of a 10*l.* penalty: and the retention of possession after conviction in such penalty, renders them liable to a penalty of 25*l.* *per diem* (n): but the penalties are not incurred by an entry after payment or deposit made to or in favour of parties who were believed to be, but were not, actually entitled (o).

Remedy against landowner refusing possession.

In case of an unlawful refusal by the landowners or occupiers to give up possession or permit an entry, the promoters of the undertaking can claim the assistance of the sheriff (p): and a landowner who has by his silence and conduct encouraged a company to carry on their works, upon the supposition that they were entitled to enter and take the land in question, and who subsequently disputes the terms of the contract, is not entitled to an interlocutory injunction

(l) *Mason* v. *L. C. & D. R. Co.*, 1 Ch. 61.

(m) *Bedford* v. *S. E. R. Co.*, 1 S. N. S. 272; *Lee* v. *L. C. R. Co.*, 1 Jur. N. S. 1000.

(n) S. 89; *Hutchinson* v. *Manchester R. Co.*, 15 M. & W. 44, and *Hutchinson* v. *L. L. R. Co.*, 5 R. C. 718.

See last note, and *Stech* v. *M. R. Co.*, 21 L. T. 387.

S. 91. Apparently the section imposes no obligation on the company to call in the assistance of the sheriff, excepting where the entry would be forcible. *Lowmore* v. *Tiverton R. Co.*, 22 Ch. D. 25; see p. 41.

to restrain them from so entering (*p*). Where a company, on a purchase, agreed with the landowner that, if they should require any additional land for the purposes of their railway, it should be sold to them at a stated price, it was held that they were authorized under the agreement to purchase additional land at any time within the statutory period for the completion of the works, although their compulsory powers had expired (*q*).

Whether compulsory powers can be exercised after time limited for completion of works has expired.

Where a railway company, after the compulsory powers of their original Act had expired, obtained another Act authorizing additional works, it was held that a notice to treat, given under the former Act, was not available for the taking of land subject to the compulsory powers of both Acts (*r*). But the decision in this case was mainly rested on the ground, that there was no evidence that the land proposed to be taken was required for any specific purpose authorized by the former Act. In the recent case of *Tiverton and North Devon Railway Company* v. *Loosemore* (*s*), the late Earl Cairns, in his speech on moving the judgment of the House of Lords, made the following observations (*t*) on the case above referred to:—"Were such a case now to arise, I should be disposed to think, as I was disposed to think in *Richmond* v. *North London Railway Company*, that if nothing more was done, and the company have slept upon their rights, and certainly if the delay cannot be explained, they should be held to be disabled from going on with any compulsory purchase, and in such a case the landowner should, as I think, be held to be disabled also. Both parties have been content to let the time run out. There is no *rei interventus*, no change of the *status quo ante*, nothing which requires to be undone. The whole matter has been a project merely; and as a project it has

(*p*) *Greenhalgh* v. *Manch. & Bury. R. Co.*, 3 M. & C. 784; *Swaine* v. *G. N. R. Co.*, 3 N. R. 109, 399; and see Seton, 177, 196.

(*q*) *Rangeley* v. *M. R. Co.*, 3 Ch. 306.

(*r*) *Richmond* v. *N. L. R. Co.*, 3 Ch. 679.

(*s*) 9 App. Ca. 480.

(*t*) *Ibid.* p. 189.

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come to an end." In the case before the House of Lords, the company had, a few days before the expiration of the period of three years, limited for their exercise of compulsory powers of purchase, served on a landowner a notice to treat for part of his land. No agreement was come to between the parties, nor was the compensation assessed, and nothing more was done until thirteen days before the expiration of the period of five years prescribed for the completion of the railway, when the company, having complied with the requirements of sect. 85 of the Lands Clauses Act, entered and proceeded to make the railway, in spite of the protest and resistance of the landowner. It was decided that, whether or not the railway could have been completed within the remaining thirteen days of the period of five years, the entry was lawful, and that the company could not be restrained by injunction, but were entitled to remain and complete the works after the expiration of the five years.

Company after lawful entry cannot be ejected.

A company which has duly entered under the 85th section cannot be ejected by the landowner at the expiration of the time limited by the special Act for the exercise of their compulsory powers, although the amount of purchase-money remain unascertained, and the land be not conveyed (*u*): it is for the landowner to take the initiative under the 68th section in order to have the amount ascertained (*x*).

Lien on railway for unpaid purchase-money.

The owner of land of which a railway company has taken possession, whether under the 85th section or by agreement, has a lien upon the land for his unpaid purchase and compensation moneys, which the Court will enforce by sale, even though the railway is actually made and ready for traffic (*y*); and the fact of a deposit and bond having been made and given under the 85th section does not prejudice

(*u*) *Dee* v. *N. S. R. Co.*, 16 Q. B. 526; *Hudson* v. *Leeds* v. *Bradford R. Co.*, 16 Q. B. 796; *Wrigley* v. *S. D. R. Co.*, 16 Q. B. 539.

(*x*) *Adams* v. *Blackwall R. Co.*, 2 M. & G. 130.

(*y*) *Wong* v. *Tottenham R. Co.*, 3 Ch. 740; *Wallis* v. *Ware R. Co.*, 1 Eq. 195; and see *Allgood* v. *Merrybent R. Co.*, 33 Ch. D. 571.

his lien for the excess of the purchase and compensation moneys over the sum deposited (z).

Where a railway company purchased land by agreement with the landowner and entered into possession, but afterwards leased the line which they constructed to another railway company, the vendor was held entitled, in a suit for specific performance against both companies, to a declaration of lien for his unpaid purchase-money, and to have it enforced by a sale (a), and the appointment *ad interim* of a receiver (b); and this has been done even where a receiver was already in possession at the instance of debenture holders (c). But the Court will not for the purpose of enforcing the lien restrain the company from running trains over the land until the sale is made (d).

Landowners have no lien for costs of arbitration.

Where land is taken by a railway company and the purchase-money is ascertained by arbitration under the Lands Clauses Consolidation Act, 1845, the vendor is not entitled to a lien on the land sold for the costs of the arbitration payable to him by the company (e).

More notice does not bring land within the 68th section.

Lands included in the company's notice, but not actually taken or actually affected by the company, are not within the 68th section, and the landowner's remedy is under the preceding sections (f).

(z) *Walker* v. *Ware R. Co.*, 1 Eq. 195.

(a) *Lush p. of Winchester* v. *Mid Hants R. Co.*, 5 Eq. 17.

(b) *Bell* v. *Northampton R. Co.*, 2 Ch. 100; *Coens* v. *Bognor R. Co.*, 1 Ch. 591; and see cases cited in next note, and *infra*.

(c) *Drax* v. *Somerset & Dorset R. Co.*, 38 L. J. Ch. 232; *Williams* v. *Aylesbury R. Co.*, 21 W. R. 819.

(d) *Manns* v. *I. of Wight R. Co.*, 5 Ch. 414; *Lyatt* v. *S. & U. R. Co.*, 13 Eq. 261. See, however, *Earl St. Germans* v. *Crystal Palace R. Co.*, 11 Eq. 508, where the company was restrained from continuing in possession. See further on this subject, *post*, p. 835 *et seq.*; 1220 *et seq.*

(e) *Earl Fitzwilliam* v. *S. & U. R. Co.*, 13 Eq. 524.

(f) *Buckinshaw* v. *Birmingham, &c. R. Co.*, 5 Ex. 175. As to the meaning of the word "take" in the Act, see *Spencer* v. *Metrop. Board*, 22 Ch. D. 142.

Chapter XI.

CHAPTER XI.

AS TO SEARCHES FOR AND INQUIRIES RESPECTING INCUMBRANCES.

1. *What inquiries should be made of vendor's solicitors; and of supposed incumbrancers, trustees, and tenants.*

2. *What searches should be made for incumbrances,—law respecting judgments, &c.*

3. *Time for making searches and inquiries.*

Section 1.

What inquiries should be made of vendor's solicitors: and of supposed incumbrancers, trustees, and tenants.

Inquiry as to incumbrances, should be made of vendor's solicitors;

(1.) It was, until recently, a very usual course to inquire of the vendor's solicitors (as part of the general requisitions on the title), whether they were aware of any judgment or other incumbrance affecting the property, or of any other matter not noticed in the abstract and affecting the vendor's ability to make a marketable title, subject only to the stipulations in the contract or conditions of sale; and occasionally, whether the property was held under the title abstracted and under no other title (*a*). Such an inquiry may often save much useless expense; and a favourable reply not only adds to the security which the purchaser will derive from the searches of his own professional advisers, but will also remove any doubt as to his right to be paid for the preparation of the conveyance, if such searches disclose incumbrances which cannot be got in. It has, however, been held by the Court of Appeal in a recent case (*b*), that the duty of the vendor with regard to title is limited to furnishing an abstract, and verifying or completing it on any point on which the purchaser may show

(*a*) As to the expediency of this inquiry, see Mr. Christie's evidence before the Registration Commissioners, 1st Report.

(*b*) *Re Ford and Hill*, 10 Ch. D. 365.

that it appears to be defective, and that this duty does not extend to answering questions for the purpose of negativing the existence of incumbrances: and the inquiry was held to be one which neither a vendor nor his solicitor is bound to answer. When there is reason to suspect the existence of any particular incumbrances, an application should be made to the supposed incumbrancers: the motive for the application should, of course, be stated, and the parties applied to will be bound by their replies (c); it does not, however, appear that a mortgagee need answer any inquiry respecting the particulars of his security, unless the applicant is entitled and offers to redeem him (d).

and of supposed incumbrancers.

An incumbrancer, it is said, need not voluntarily communicate the existence of his claim to a person whom he knows to be about purchasing the estate (e): this, however, it is conceived, only holds good in cases where there is no reason to suppose that the vendor is about to commit the fraud of selling the estate as unincumbered: if, with knowledge of such a fraud being in progress, the incumbrancer were to conceal his claim, Equity, it appears, would interfere to prevent his setting up his right against the purchaser; and infancy, or coverture, would be no excuse (f): *à fortiori*, he would be postponed in Equity, if he were a direct party to the fraud, or facilitated or encouraged its commission (g): and, inasmuch as no prudent person buys an equity of redemption without communicating with a known incumbrancer, it may be conjectured that if a mortgagee, being aware that the purchase was about to be concluded on a certain day, and having received no inquiry from the purchaser on the subject of the charge, were to allow him to complete in ignorance of its existence, the Courts would be disposed, on slight

Whether incumbrancer need communicate his claim to intended purchaser.

(c) *Ibbotson* v. *Rhodes*, 2 Vern. 554; *Strange* v. *Hawkes*, 1 D. M. & G. 186; 1 D. & J. 632; *vide ante*, p. 109.

(d) *Bayden* v. *Bagnold*, 2 Y. & C. C. C. 390.

(e) *Osborn* v. *Lea*, 9 Mod. 96; see p. 97; *Dolman* v. *Nokes*, 22 B. 402.

(f) *Savage* v. *Foster*, 9 Mod. 36; *Clare* v. *Lord of Bedford*, 13 Vin. Abr. 536, *Re Lush's Trusts*, 4 Ch. 591. As to fraud by a married woman, *vide post*, pp. 947, 1120.

(g) *Berrisford* v. *Milward*, 2 Atk. 49.

additional grounds, to treat such an incumbrancer as an accomplice of the vendor (*h*).

Inquiry of trustees.

If the interest about to be purchased be merely equitable, inquiry as to incumbrances should, as a matter of prudence, be made of the trustees, or other parties in whom the legal estate is vested; and, as a general rule, notice should be given to them of completion. Thus, notice to trustees for sale of an assignment of a share of the sale proceeds will give priority, even though the estate is unsold, and the time for selling has not arrived (*i*). The same precaution is not absolutely necessary where the subject-matter of the purchase is an equitable interest in real estate, or in a chattel real (*k*); but a solicitor who acts with a view to his own, as well as to his client's safety, will in this, as in every other doubtful case, use too much, rather than too little, caution.

Liability of trustee giving wrong information.

Trustees are often unwilling to answer such questions, on account of a case (*l*) where a trustee, who (through forgetfulness as he subsequently alleged) denied the existence of a charge of which he had notice, was held liable to the purchaser: it appears, however, that he told the purchaser "positively and distinctly" (*m*) that the vendor was absolutely entitled, that he had "an undoubted right" to assign the property (*n*); and, probably, a more guarded reply, one, for instance, merely denying the present recollection of any notice, would not involve a trustee in similar liability.

Inquiry of tenants.

And, as notice of a tenancy is notice of the tenant's equities (*o*), it is a proper precaution, where the property is

(*h*) And see *Stevens* v. *Cooper*, 1 Ch. R. 62.

(*i*) *Ex parte Hewitt*, 2 K. & J. 74; *Re Hughes' Trusts*, 2 H. & M. 390; *Foster* v. *Cockerell*, 3 C. & F. 456. And as to notice, Ch. XV. s. 2.

(*k*) See cases cited in last note, and *Jones* v. *Jones*, 8 Sim. 633; *Wilkinson* v. *Rabbits*, 14 Sim. 76; *Wilcox* v. *Dent*, 5 Hare 11; *Knight* v. *Harrison*, 2 K. & J. 104.

(*l*) *Burrows* v. *Lock*, 10 V. 470; and *Wilson* v. *Wallis*, 1 D. F. & J. 233; *Lee* v. *Sankey*, 2 J. & H. 1.

(*m*) *Burrows* v. *Lock*, 10 V. p. 476.

(*n*) *Ib.* p. 475.

See Lord Eldon in *Allen* v. *Anthony*, 1 Mer. 282, 284; *Daniels* v. *Davison*, 16 V. 249; *Bailey* v. *Richardson*, 9 Ha. 734; *Wilbraham* v. *Livesay*, 18 B. 209; *Cavander* v. *Bulteel*, 9 Ch. 79, 81, and *post*, p. 975 *et seq.*

not in hand, to inquire of the occupying tenants as to the extent and nature of their interests (*p*). It was stated in former editions of this work, that notice of the tenancy was not necessarily notice of the tenant's equities, as between vendor and purchaser. The point, however, was decided the other way by Lord Romilly (*q*), and his decision was subsequently followed in the Common Pleas (*r*), and in the Irish Court of Appeal (*s*); but in another case (*t*) the Lords Justices, affirming the decision of Sir George Jessel, M. R., restored what is conceived to be the true rule, *viz.*, that the doctrine as to notice has reference merely to equities between the purchaser and the tenant after the completion of the contract, and has nothing to do with the rights and liabilities of vendor and purchaser pending completion. The obvious answer to the reasoning in Lord Romilly's judgment in the case before him above referred to, is that it is not the duty of the tenant, and it is the duty of the vendor to inform the purchaser what it is that he is about to buy. A description of property as "now or late in the occupation of N. R. and others," has been held not to affect the purchaser with notice that the tenants held on leases for lives at low rents (*u*). So, in another case, where a shop with a flat roof was demised "as the same was late in the occupation of H. C.," it was held that these words were inserted in the description merely for the purpose of identifying the property, and not of limiting the operation of the deed; and that they did not amount to a notice of a right to the occupation of the flat roof (*v*); but a purchaser buying the undivided share of a tenant in common in a house, which the purchaser knows is occupied for business purposes by a

Reference to occupancy.

(*p*) 1 Jarm. Conv. 119.

(*q*) *James* v. *Lichfield*, 9 Eq. 51; see also *Penny* v. *Watts*, 1 M. & G. 150; *Wilbraham* v. *Livesey*, 18 B. 206; and see 1 Ha. 62.

(*r*) *Phillips* v. *Miller*, L. R. 9 C. P. 196; reversed in the Ex. Ch. but on other grounds; see L. R. 10 C. P. 420.

(*s*) *Carroll* v. *Keayes*, 8 I. R. Eq. 97.

(*t*) *Caballero* v. *Henty*, 9 Ch. 447.

(*u*) *Hughes* v. *Jones*, 3 D. F. & J. 307.

(*v*) *Martyr* v. *Lawrence*, 2 D. J. & S. 261; *dis.* K. Bruce, L. J.; *Polden* v. *Bastard*, L. R. 1 Q. B. 156, a case of devise. See further on this subject, *post*, p. 977.

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firm in which the vendor is a partner, has notice that the house is partnership property, should such be the fact (*x*).

Where a tenant has recently given up possession.

No inquiries need be made of a person who has recently held, but relinquished possession of the property (*y*): if it is clear that there has been an intentional abandonment of possession (*z*).

Inquiry as to undisclosed easements.

It may often be prudent for a purchaser to inquire whether any undisclosed easement, such as a way of necessity or a right of light or of drainage (*a*), exists over or through the property; such an easement may pass or be reserved by implication, without express words (*b*); and the existence of such an easement where it is patent, and no inquiry has been made respecting it, is no defence to a vendor's suit for specific performance (*c*).

As to undisclosed restrictive covenants.

So, too, it may sometimes be well to inquire whether there are any undisclosed covenants or conditions, restrictive of the enjoyment of the property in the hands of the purchaser (*d*).

As to title deeds.

So, a prudent purchaser will inquire for the title deeds, and demand a satisfactory explanation if any of them are not forthcoming. His omission to make such an inquiry may perhaps fix him with notice of an equitable mortgage

[illegible] 1 R. & M. [illegible] 572, 581.

(*a*) See [illegible] 1 K. & J. [illegible] case of undisclosed smoke easement, and *post*, pp. 921, 974.

(*b*) *Pearson* v. *Spencer*, 1 B. & S. 571, *Pyce* v. *Carter*, 1 H. & N. 916; [illegible] 127 [illegible] 1 Q. [illegible] 18 Ch. D. [illegible] 26 Ch. D. [illegible] 11 L. R. [illegible]

[illegible] *Pascal*, 5 Ves. [illegible]

[illegible] v. *Wright*, 1 H. & M. 167; [illegible] 4 B. 110; [illegible] 1 Eq. 200, *Morris* v. *Cook*, [illegible] Eq. 252, *Wilson* v. *Hart*, 1 Ch. 163, and see and consider *Carter* v. *Williams*, 9 Eq. 678.

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Physical fact may be notice of a charge, &c.

by deposit (*e*). So, a mere physical fact may, it seems, amount to notice of a charge affecting the property; *e.g.*, upon the purchase of land forming part of a district lying beneath the level of the neighbouring sea, the purchaser was held to be affected with notice of a private deed, under which the owners of the land were liable to contribute to the expense of keeping up a sea-wall (*f*); so, the purchaser of a house has been held to have notice of an agreement to grant a smoke-easement, from the mere fact of there being fourteen chimney-pots on the chimney stack, and only twelve flues in the house (*g*). But the doctrine of constructive notice from the physical condition of the property will not be extended; thus, in a recent case it was held that the mere fact of there being windows in a house overlooking the purchased property is not constructive notice of any agreement for a right to light through them (*h*).

Section 2.

What searches should be made for incumbrances; law respecting judgments, &c.

Conveyancing Act, 1882.

(2.) *What searches should be made for incumbrances;—Law respecting judgments, &c.*

The Conveyancing Act, 1882, has considerably simplified the law and practice relating to searches. By sect. 2, sub-sect. 1, any person may make a requisition (*i*) for search to be made in the Central Office of the Supreme Court of Judicature for entries of judgments, deeds, or other matters or documents, of which entries are required or allowed to be made in that office by any Act described in Part I. of the first schedule to the Conveyancing Act, 1881, or any other Act (*j*). By sub-sect. 2 the proper officer is to make the

(*e*) Sug. 767, and cases there cited; and see *post*, p. 979 *et seq.*

(*f*) *Morland* v. *Cook*, 6 Eq. 252.

(*g*) *Hervey* v. *Smith*, 22 B. 299

(*h*) *Allen* v. *Seckham*, 11 Ch. D. 790.

(*i*) As to the form of requisition, see sub-sects. 4 and 5.

(*j*) The sections of the Acts included in the first part of the first schedule principally referred to are sects. 11, 13, 18, 19, 22 of 1 & 2 V. c. 110, sects. 4, 5, 7 of 2 & 3 V. c. 11; sects. 4—7, 11, 12 of 18 & 19 V. c. 15, sects. 11, 22 of 22 & 23 V. c. 35, sects. 1—5 of 23 & 24 V. c. 38, the whole of 23 & 24 V. c. 115, sects. 3 and 4 of 27 & 28 V. c. 112, sects. 48 and 49 of 28 & 29 V. c. 104, sects. 1—3 of 31 & 32 V. c. 54. The words

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search required, and to make and file in the office a certificate of the result, office copies of which are to be issued on requisition. By sub-sect. 3 the certificate is to be conclusive in favour of a "purchaser"—who is defined to include a lessee or mortgagee or other person who for valuable consideration takes or deals for property—as against persons interested under or in respect of judgments, deeds, or other such matters or documents as above-mentioned. By sub-sect. 8, when a solicitor obtains an office copy certificate of result of such search, he is not to be answerable in respect of any loss from error in the certificate. By sub-sect. 9, where a solicitor is acting for trustees, executors, agents, or other persons in a fiduciary position, those persons also are not to be so answerable. By sub-sect. 10, where such persons obtain such an office copy without a solicitor, they are to be protected in like manner. By sub-sect. 11, the provisions of the section are not to apply to deeds enrolled under the Fines and Recoveries Act, or under any other Act, or under any statutory rule. The list of searches to which the provisions of the Act apply, is, of course, not exhaustive; searches in county registers, Customary Court Rolls, or for bankruptcies being excluded. The provisions of the Act and the form of requisition prescribed by the Rules made under it, while they have simplified the procedure, have left the necessity or propriety of making the different searches dependent on the general law.

Liability of solicitor omitting to search for incumbrances, &c.

A solicitor is said to be liable to his client for any loss occasioned by his omission to make any one of the numerous searches, which may by possibility disclose matter affecting the title (k); and he would certainly be held liable for

"any other Act" apply, it is conceived, to future Acts, which may allow or require entries of the kind specified, [illegible], the provision for registration of an order under s. 7 of the Settled Land Act, 1884, contained in sub-s. 5 of that section.

(k) 1 Jarm. Conv. 101; *Watts* v. *Porter*, 3 E. & B. 71; see, as to negligence in stating a case for counsel's opinion, *Jessen* v. *Pearman*, 5 Dowl. & R. 687; as to negligence in passing a defect in title, *Baker* v. *Chandless*, 3 Cal. p. 17, and generally as to the liability of a solicitor omitting to make the usual searches, *Brooks* v. *Day*, 2 Dick. 572; *Parker* v. *Rolls*, 14 C. B. 691.

omitting to require the statutory search to be made; unless, however, special circumstances render such a course expedient, it was not formerly usual for conveyancing counsel, upon private purchases, to direct a search for more than judgments (*l*), Crown debts and accountantships, *lites pendentes*, and annuities (*m*); and also a general search in the county register (if any), and in the Customary Court Rolls (if the property is copyhold); and it may be doubted whether a solicitor would be liable for an omission which is sanctioned by general practice. At any rate, it is conceived, that where the title is laid before counsel, who advises a search for certain specified incumbrances, the solicitor need not make a more extensive search, unless aware of some particular reason for so doing: but if to his knowledge such reason exist, he is bound to act upon it: *e.g.*, it has been said that he was bound to search the Insolvent Court, if he had reason to suspect that the vendor had been insolvent, or even if there was notice that he was or had been in embarrassed circumstances (*n*): and the fact of the solicitor making inquiry on the point from a party whose known interest it was to deceive him, has been held to be an admission as against himself that an efficient search ought to have been made (*o*).

Drainage loans.

And on purchases of large estates, or even of agricultural land of moderate acreage, it is now prudent to search for drainage and land improvement loans (*p*); and in the case of house property within the district of a local authority, it is desirable to inquire whether there is any charge under the

(*l*) And now for writs of execution under the 23 & 24 V. c. 38. Judgments entered up against an insolvent under the 1 & 2 V. c. 110, were frequently omitted to be registered; it being considered doubtful whether they required registration under the Act.

(*m*) *Vide post*, p. 568.

(*n*) By Erle, J., in *Cooper* v. *Stephenson*, 21 L. J. Q. B. 292; a case of a mortgage.

(*o*) *S. C.*

(*p*) 19 & 20 V. c. 9; 24 & 25 V. c. 133, and 27 & 28 V. c. 114; 33 & 34 V. c. 56. Searches at the Office of the Inclosure Commissioners, No. 3, St. James's Square, and at the Land Registry Office, are generally sufficient. See further on the subject, 2 Dav. pt. 2, pp. 200 *et seq.*, and the Mortgage Debenture Act, 1865, 28 & 29 V. c. 78. See for full list of such searches, Elph. & Cl. 109 *et seq.*

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Public Health Act, 1875 (q). These incumbrances, where they exist, take priority of all other charges; and, in more than one instance in the author's own experience, an omission to make the search would have involved serious consequences. The expediency of making it is not, however, as generally known in the profession as it ought to be. On purchases of land within the metropolitan area, search should be made at the office of the Board for charges authorized by various Metropolitan Management and Building Acts (qq).

Metropolitan Management and Building Acts.

Certificate a part of the title.

A certificate of search under the Act of 1882 is conclusive; and no purchaser is entitled to go behind it, although he may make searches to which it relates independently. Such a certificate forms, it is conceived, a part of the title: and a purchaser need only search as from the date of the last certificate appearing on the abstract.

The full list of searches is a formidable, almost a prohibitive, one; comprising writs of execution, registered under 23 & 24 Vict. c. 38, and 27 & 28 Vict. c. 112, appointments of a receiver, judgments, Crown debts (r), decrees, orders, and *lites pendentes*, registered under the 1 & 2 Vict. c. 110, and 2 & 3 Vict. c. 11 (including orders under sect. 7 (5) of the Settled Land Act, 1884), and grants of annuity and rent-charges registered under the 18 & 19 Vict. c. 15; searches for recognizances, and for grants of life annuity and rent-charges registered under the former Acts, for adjudications in bankruptcy, and also the county registers and manorial Court Rolls in the appropriate cases, and also in many cases for drainage and land improvement loans.

As to searching for judgments, general law respecting.

Of these searches, the most generally important is that for judgments, and writs of execution issued, or appointments of a receiver made, under them; and, although the necessity for making this search, or rather the risk of omitting to do so, has

(q) See [illegible] 17 Ch. D. [illegible] 17 Ch. D. 7[illegible]

(qq) See Elph. & C. 117 and 15 V. c. 14, [illegible]

(r) See [illegible] 25 & [illegible] V. c. 104, s. 48. Lands are not now bound by Crown debts until execution has issued, and been registered.

been greatly lessened by recent legislation, it is still necessary, in order clearly to understand the law on this important subject, to consider it briefly as it existed prior to the 1 & 2 Vict. c. 110, and then the alterations which have been introduced by that and later statutes.

As respects purchasers, &c., without notice, law remains as before 1 & 2 Vict. c. 110.

And here it may be proper to observe, that as against purchasers or mortgagees who advance their money without notice of subsisting judgments, the 1 & 2 Vict. c. 110, is rendered a dead letter by the subsequent Act of 2 & 3 Vict. c. 11 (*s*): so that, as respects such purchasers and mortgagees, the law as it existed before the passing of the former Act, is alone important: nor does registration under that Act amount to notice (*t*); unless a search is actually made (*u*): at the same time it is inexpedient to rely upon any presumed want of notice (*x*) (especially where the same solicitor acts for both parties); and the propriety of a search by an intended purchaser or mortgagee, may, practically, be considered chiefly with reference to the extended effect of judgments under the new law.

But want of notice cannot be relied on in practice.

Judgments under old law - what they affected:

Upon an *elegit*, under the old law, the judgment creditor might take in execution a moiety (or under two judgments of the same term an entirety) (*y*), of the following property of his debtor (*z*): *viz.*, freeholds, land held in ancient demesne, rents-charge, estates granted by the Crown for the maintenance of dignities, impropriate tithes, and terms for years, including (perhaps) leases of copyholds granted by licence of the lord, or under a special custom; and this,

a moiety of freeholds, &c.;

(*s*) Extended to judgments in the Palatinate Courts, by 18 & 19 V. c. 15.

(*t*) See and consider 2 & 3 V. c. 11, s. 5; so held in *Robinson* v. *Woodward*, 4 De G. & S. 562; *Westbrook* v. *Blyth*, 3 E. & B. 737, *Lane* v. *Jackson*, 20 B. 535; where it was held that it was not incumbent on the purchaser to search the register.

(*u*) *Procter* v. *Cooper*, 2 Dr. 1; affd. 1 Jur. N. S. 149.

(*x*) For this, among other reasons, *viz.*: that if judgments exist, and are discovered by a sub-purchaser upon a re-sale, it may be impossible to satisfy him of the original want of notice; *Tuer* v. *Hesse*, 4 D. M. & G. 195.

(*y*) *Att.-Gen.* v. *Andrew*, Hard. 23; *Doe* v. *Creed*, 5 Bing. 327; (case of entirety taken by two creditors on writs tested the same day and term).

(*z*) Prid. J. 7, 8, 9.

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whether the same respectively were held in severalty, coparcenary, or in common; and although they were acquired subsequently to the judgment (*a*).

reversions,

The right affected reversions on leases for lives or years (*aa*), estates held by a husband during coverture or by the curtesy, estates tail during the life of tenant in tail, and estates held in joint tenancy during the life of the joint-tenant against whom execution issued.

terms for years,

And, as to terms for years, either the moiety might be extended upon a single writ, or the entirety might be sold as part of the debtor's chattels.

lands held in trust for the debtor.

And under the 10th section of the Statute of Frauds, the sheriff is empowered to deliver execution of all such lands, &c., as any person or persons should be seised or possessed of, in trust for the debtor at the time of execution sued, like as if the debtor had been *seised* of such lands, &c., of such estate as they be seised for him at the time of execution sued. This provision has been held not to affect trusts of terms for years (*b*), or equities of redemption (*c*), or any equitable estate in which the debtor has not the *sole* beneficial interest (*d*); or estates which, although held in trust for the debtor at the date of the judgment, are aliened prior to execution (*e*).

What they did not affect.

But advowsons in gross, glebe, rent-charge, and copyholds (*f*) (except, perhaps, as to copyhold leases therein, were not extendible under the old law; nor were the lands of a tenant in tail, or joint-tenant, extendible, except [illegible] (*g*).

[illegible] 2 P. W. 10[illegible] [illegible] All [illegible] 2 Saund. [illegible] K. & A. [illegible] [illegible] 1 Lev. [illegible] 80, pl. [illegible] [illegible] 1 Mod. [illegible]

(*b*) Prid. J. 1[illegible] [illegible] *Hill* v. *Hill*, 10 St. 48. 8 Ves. 467, [illegible] [illegible] Ch. R. 226 [illegible] [illegible] 1 Lev. [illegible] 31[illegible], [illegible] 16 W. [illegible] [illegible] *Hill* v. [illegible], 2 Atk. [illegible] 107, [illegible] 1 J. & W. [illegible] Cr. & M. 1[illegible], and [illegible] [illegible] St. Saunders 17, 18. *Hill*, 1 B. & Ald. 68[illegible]

(*c*) Prid. J. 7; *Ashburnham* v. *St. Jerm*, Cro. Jac. 85. [illegible] v. *Hall*, 8 Atk. 7[illegible]

And it seems doubtful whether the exemption of copyholds extended to customary freeholds (*h*).

Nor, under the Statute of Frauds (*hh*), as against purchasers (*i*), was a term for years bound, until the writ was delivered to the sheriff (*k*); nor did the writ bind after it had been returned without a sale (*l*).

Docketing was necessary as against purchasers.

And in order that a judgment might be binding as against purchasers, or mortgagees, it had, unless it were a Palatinate judgment, to be docketed under the Acts of William and Mary (*m*); a very slight omission in the prescribed formalities as to docketing rendered the judgment void (*n*); but an old undocketed judgment, if duly registered (*nn*) under the 1 & 2 Vict. c. 110, became valid under 2 & 3 Vict. c. 11, s. 5, against purchasers and mortgagees without notice, only to the extent to which a judgment, duly docketed under the old law, would have been valid against them (*o*). By the 4 & 5 Will. & M. c. 20, no undocketed judgment was to have any preference against heirs, executors, or administrators in the administration of assets. The 1 & 2 Vict. c. 110, did not contain any similar provision; and the result of closing the docket under the 2 & 3 Vict. c. 11, was to revive the law as it existed prior to the Statute of William and Mary; thus making an executor liable for a *devastavit*, if he paid a simple contract debt before a judgment debt, even though he had no actual notice of the latter (*p*); but this omission has been supplied by a recent Statute (*q*).

As against executors and administrators in administration of assets.

(*h*) See Scriven, 570, Mann. Exch. Pract. 2nd ed. 42, 350, 358 *et seq.*, 3 Man. & R. 332, 338.

(*hh*) Sect. 16, Prid. J. 11.

(*i*) *Sed aliter*, as against the debtor's personal representatives, *Ranken* v. *Harwood*, 5 Ha. 215.

(*k*) Prid. J. 12; *Burdon* v. *Kennedy*, 3 Atk. 739; *Causton* v. *Mackleu*, 2 Si. 242.

(*l*) *Williams* v. *Craddock*, 4 Si. 313.

(*m*) 4 & 5 W. & M. c. 20, made perpetual by 7 & 8 W. III. c. 36.

(*n*) *Bramling* v. *Plummer*, 8 D. M. & G. 717.

(*nn*) It is not clear that an old undocketed judgment could be registered, 2 & 3 V. c. 11, s. 2, Elph. & C. 26, but, even if it could, its effect could be no greater than that stated in the text.

(*o*) *Doswell* v. *Reeve*, 11 Jur. N. S. 764.

(*p*) *Fuller* v. *Redman*, 26 B. 600.

(*q*) 23 & 24 V. c. 38, ss. 3 & 4.

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Entry in local register.

Where the judgment was intended to affect land in a register county, it had to be entered in the local register, as well as in the Common Pleas, now the Central Office; and the priorities of several judgments *inter se* depended upon the order of their registration in the local registry (*r*); so that a judgment registered in the Common Pleas, but not in the local register, was postponed to a subsequent judgment which was first entered in the local register (*s*).

But purchaser was bound in Equity by notice of undocketed judgment.

The omission to docket or register, was, however, prior to 3 & 4 Vict. c. 82, s. 2, immaterial in Equity, if a purchaser or mortgagee advanced his money with actual notice (either to himself or his agent) of the judgment (*t*). In a case already referred to, where an estate was conveyed "subject to the charges and incumbrances affecting the same," a judgment against the vendor, in docketing which the "number roll" had not been entered, was held not to affect the land: but the decision rested entirely on the question whether the requisitions of the Statute had been complied with; and it does not appear that the purchaser had examined the docket-book (*u*).

Equity aided judgment creditor against equitable estates.

And Equity would assist a judgment creditor to the partial equitable interest of his debtor, in those cases in which he would have been entitled to execution under the Statute of Frauds in case the debtor had owned the entire beneficial interest (*v*); but he was obliged to sue out an *elegit* before filing his bill (*w*). So, first filing out execution under a *fi. fa.*, he could obtain relief in Equity against the debtor's equitable interest in a term for years (*x*).

(*r*) Prid. J. [illegible] v. *Hol[illegible]*, 1 Sn. N. S. [illegible], *W[illegible]* v. [illegible], 3 L. & B. [illegible], *H[illegible]* v. [illegible], 4 E. & B. 271, *[illegible]* v. [illegible], 3 D. F. & J. [illegible], *N[illegible]* v. *[illegible]*, 33 B. 666.

(*s*) *Hughes* v. *[illegible]*, 4 E. & B. 271, *Neve* v. *Flood*, 33 B. 666.

(*t*) Prid. J. 46, *Davis* v. *Earl of Strathmore*, 16 V. 419; *Cockburne* v. *Wright*, 6 Ir. Eq. R. 1; Sug. 521.

[illegible] v. *[illegible]*, 8 D. M. & G. 717.

Prid. J. 25.

(*u*) *N[illegible]* v. *Duke of Marlborough*, 3 M. & C. 407, *Smith* v. *Hurst*, 1 Coll. 705; S. C., 10 Ha. 30; *Godfrey* v. *[illegible]*, 33 B. 280. See this subject more fully discussed, *post*, p. 542.

(*x*) *G[illegible]* v. *Bowser*, 1 Jur. N. S. 392; *Langhorne* v. *Harland*, 2 Jur. N. S. 873.

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Judgment how affected by bankruptcy.

The judgment creditor acquired no preference in bankruptcy, unless execution had been sued before the issuing of the fiat or commission (a); but the bankruptcy of the vendor after conveyance, was no protection to a purchaser against prior judgments (b). If, however, the vendor became bankrupt before conveyance, the judgments were held to be inoperative as against a purchaser from the assignees (c).

Under the recent Act.

Under the Bankruptcy Act, 1883 (d), any execution or attachment against the land of the bankrupt, completed in good faith before the date of the order of adjudication, if the person, on whose account such execution or attachment was issued, had not, at the time of the same being so completed by seizure, notice of any act of bankruptcy committed by the bankrupt, and available against him, is to be valid, notwithstanding any prior act of bankruptcy; and there is a similar provision as respects any execution or attachment against the goods of the bankrupt.

Purchaser without notice protected by legal estate.

It followed from what has been above stated, that a purchaser who, before judgment entered up (e), got in an outstanding legal estate, (even a mere satisfied term,) or procured a declaration of trust in his favour by the trustee, or who, (as in the case of a mortgagee purchasing the equity of redemption,) was himself seised or possessed of the legal estate, was protected from judgments of which he had no notice (f) at the time of his purchase: but, of course, where the outstanding

(a) *Orlebar* v. *Fletcher*, 1 P. W. 737; *Newland* v. *Anon.*, *ib.* 92, *Sloper* v. *Fish*, 2 V. & B. 115; *Re Ferrin*, 2 D. & War. 147; *Sharpe* v. *Rhoade*, 2 Ro. 192; 6 G. IV. c. 16, s. 108; but see 12 & 13 V. c. 106, s. 184; which section was not repealed by 24 & 25 V. c. 134, see Schedule G.; *Hutton* v. *Cooper*, 6 Ex. 159, *Ex parte Boyle*, 3 D. M. & G. 515; *Holmes* v. *Tutton*, 24 L. J. Q. B. 346; Sug. 539; and see now 32 & 33 V. c. 71, s. 95.

(b) *Baldwin* v. *Belcher*, 1 J. & L. 18, 25; *aliter*, as regards a mortgagee; *Willock* v. *Dargan*, 1 Ir. Ch. R. 39; *White* v. *Baylor*, 1 D. & War. 297.

(c) *Sharpe* v. *Rhoade*, 2 Ro. 192.

(d) 46 & 47 V. c. 42, s. 45, under which the return of the sheriff to the writ to an elegit is equivalent to seizure; *Re Hobson*, 33 Ch. D. 493.

(e) Sug. 539; Elph. & C. 7.

(f) *Tunstall* v. *Trappes*, 3 Si. 286, 299; *Greswold* v. *Marsham*, 2 Ch. C. 170.

estate was less than the fee simple, it was no protection against subsisting judgments of a date prior to its creation; and the want of notice was essential in Equity.

Purchaser under power of appointment, not affected by judgments, notwithstanding notice.

But the exercise of a power of appointment defeated a judgment entered up subsequently to the creation of the power; and notice in this case was immaterial (*h*), for the judgment only affected the estate limited until and in default of appointment.

Effect of judgment after contract.

A judgment entered up against the vendor, subsequently to the contract but before conveyance, was immaterial in Equity (*i*), except that it formed a lien upon such part (if any) of the purchase-money as remained unpaid (*k*); and an ejectment against a purchaser in possession by a creditor who had sued out an *elegit* on such a judgment, would be restrained by injunction (*l*): so, also, a trust for sale was not affected by subsequent judgments against any party upon whom such trust was binding; nor, if the trustee had power to give receipts, were the judgment creditors necessary parties to the conveyance (*m*): nor was it material that the sale was not by the trustees, but by the Court (*n*): and the same, it is conceived, is the rule under the new law. Even a voluntary settlement in favour of third parties is unaffected by a subsequent judgment against the settlor (*o*): but a bare voluntary trust for sale, when merely equivalent to an authority to sell, for the settlor's own benefit, would, it is apprehended, be subject to judgments entered up against him, prior to a binding contract being entered into by the trustee.

(*h*) 3 Sk. 200; *Tetlow* v. *Sandes*, 6 Sk. 517; *Sloane* v. *Sloane*, 2 M. & C. 112; where an indemnity was taken against the judgment.

(*i*) *Lodge* v. *Lynch*, 4 Sk. 70, 75; Sug. 519.

(*k*) Prid. J. 21; *Earl* v. *Duke of Norfolk*, 1 Mad. 505; so as to Bankruptcy, cases cited *ante*, p. 529, n. (*e*).

(*l*) *Brunton* v. *Neale*, 14 L. J. Ch. 8.

(*m*) *Lodge* v. *Lynch*, 4 Sk. 70; and see *Foster* v. *Blackstone*, 1 M. & K. 397; *Brown* v. *Cavendish*, 1 J. & L. 606, 628 et seq.; *Robinson* v. *Hodger*, 13 Jur. 846.

(*n*) *Alexander* v. *Crosby*, 1 J. & L. 672.

(*o*) *Barnes* v. *Lord Oxford*, 6 D. M. & G. 507.

Extended legal operation of judgments under 1 & 2 Vict. c. 110.

By the 11th section of the 1 & 2 Vict. c. 110, (as modified by the 2 & 3 Vict. c. 11, and 3 & 4 Vict. c. 82,) a judgment, duly registered, entitles the creditor to take in execution,—except as against purchasers, mortgagees, or creditors (*p*) who became such before the first day of October, 1838, and also purchasers and mortgagees without notice (*q*),—an entirety of "all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up (*r*) the said judgment, or at any time afterwards; or over which such person shall, at the time of entering up such judgment, or at any time afterwards, have any disposing power, which he might, without the assent of any other person, exercise for his own benefit."

Extended equitable operation of judgments under 1 & 2 Vict. c. 110.

And by the 13th section of the 1 & 2 Vict. c. 110, (as modified by the same Acts,) a registered judgment is, (except as against purchasers or mortgagees without notice, or purchasers, mortgagees, or creditors, who became such before 1st October, 1838,) made to operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (*s*) (including lands and hereditaments of copyhold or customary tenure) of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever, at Law or in Equity, whether in possession, reversion, remainder, or expectancy, or over

(*p*) Which seems to include simple contract creditors; *Re Perrin*, 2 D. & War. 147; decided *contrâ* on the English Act, *Simpson* v. *Morley*, 2 K. & J. 71; see judgment and distinguish *Re Perrin*.

(*q*) 2 & 3 V. c. 11, s. 5.

(*r*) That is, the day on which judgment is originally signed in the Master's book, not the day on which the roll is carried in and the judgment is entered of record; and this, although the original entry in the Master's book be subsequently amended on a revision of the taxation of costs: *Fisher* v. *Dudding*, 3 Man. & G. 238; *Newton* v. *Grand Junction R. Co.*, 16 M. & W. 117, but see *Pierce* v. *Deere*, 4 Q. B. 635.

(*s*) As to leaseholds being included in this section, see *Arcon* v. *Holmes*, 1 J. & H. 530, 544.

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which such person shall at the time of entering up such judgment or at any time afterwards, have any disposing power which he might without the assent of any other person exercise for his own benefit (*t*); and is to be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment; and is also to be binding as against the issue of his body and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments: and every judgment creditor is to have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of the Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same, with the amount of such judgment debt and interest thereon: Provided that no judgment creditor shall be entitled to proceed in Equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment (*u*). This proviso does not render it necessary that a year shall have elapsed since registration (*x*).

Judgments under the 23 & 24 Vict. c. 38.

By the 23 & 24 Vict. c. 38, after reciting that it was desirable to place freehold, copyhold, and customary estates on the same footing with leasehold estates, in respect of judgments, statutes, and recognizances, as against purchasers and mortgagees, and also to enable purchasers and mortgagees of estates, whether freehold, copyhold, or customary, or leasehold, to ascertain when execution has issued on any judgment, statute, or recognizance, and to protect them from delay in the execution of the writ, it was enacted, that no judgment, statute, or recognizance, to be entered up after

(*t*) Which excludes a power of testamentary appointment, *semble*.

(*u*) See *Smith* v. *Hurst*, 1 Coll. 705.

(*x*) *Derbyshire R. Co.* v. *Bainbridge*, 15 B. 146.

the passing of the Act, should affect any land of whatever tenure, as to a *bonâ fide* purchaser for valuable consideration, or a mortgagee, (whether such purchaser or mortgagee had notice or not of any such judgment, statute, or recognizance,) unless a writ, or other due process of execution of such judgment, &c., should have been registered as therein mentioned, before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him; but it was provided that no judgment or writ of execution, although duly registered, should affect any land as to a *bonâ fide* purchaser or mortgagee, unless such execution should be put in force within three calendar months from the time when it was registered. The Act also established a register for writs of execution, and prescribed a new mode of registration, *viz.*, in the name of the execution *creditor*; thus rendering a double search necessary (*y*). The Act also restored to heirs, executors, and administrators, in the administration of their ancestors', testators', and intestates' effects, that protection against unregistered judgments which was inadvertently taken from them by the closing of the docket under the 2 & 3 Vict. c. 11 (*z*); and provided for the re-registration, as against them, of judgments every five years (*a*).

Judgments under the 27 & 28 Vict. c. 112.

By the 27 & 28 Vict. c. 112, after reciting that it was desirable to assimilate the law affecting freehold, copyhold, and leasehold estates, to that affecting purely personal estates, in respect of *future* judgments, statutes, and recognizances, it was enacted, that no judgment, statute, or recognizance, to be entered up after the passing of the Act, should affect any land of whatever tenure, until such land should have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority, in pursuance of such judgment, statute or recognizance; and the 3rd section provides for registration in the manner prescribed by the 23 & 24 Vict.

(*y*) S. 2.

(*z*) S. 3; and see *Fuller* v. *Redman*, 26 B. 600, and *ante*, p. 527.

(*a*) S. 4; and see 2 & 3 V. c. 11, and 18 & 19 V. c. 15.

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c. 3[illegible] leave only that it is to be in the debtor's and not the creditor's name; and dispenses with prior or other registration of the judgment, statute, or recognizance; and under the 4th section the judgment creditor, having complied with the requisitions of the Statute, can apply to the Court for a summary order for sale (b).

It is beyond the scope of this treatise to attempt an exhaustive inquiry into the law upon this intricate subject; and, in the following remarks, it is proposed briefly to consider, 1st, what are judgments within the meaning of the Acts; 2ndly, what property of the debtor they affect; 3rdly, what are the present remedies of the judgment creditor; and 4thly, how far the recent statutory provisions affect the law of vendor and purchaser.

And first, what are judgments within the Acts:—

Certain decrees and orders have the effect of judgments.

By the 18th section of 1 & 2 Vict. c. 110, decrees and orders of Courts of Equity, and all rules of Courts of Common Law, and all orders of the Lord Chancellor, or of the Court of Review (while it existed) in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges or expenses, shall be payable to any person, are to have the effect of judgments. And by the 22nd section, judgments, &c., of certain inferior Courts of record may be removed into the superior Courts; and are there to be registered; and thereupon are to become binding as judgments of such superior Courts (c): and by the 13 & 14 Vict. c. 43, s. 24, the provisions of the 1 & 2 Vict. c. 110, as to decrees and orders in Equity, are made applicable to decrees and orders of the Palatine Court of Lancaster; but before the latter can affect any land as against purchasers, mortgagees, or creditors, full particulars of the cause or matter, and of the decree or order made therein, are to be left with the prothonotary of the Court of Common Pleas at Lancaster, and entered by him in

Judgments of inferior Courts may be removed.

Decrees and orders of Palatine Court.

(b) *Vide post*, p. 544.

(c) See 18 & 19 V. c. 15, s. 7.

a book kept for the purpose. And by the 18 & 19 Vict. c. 15, s. 2, similar provisions were made as to the Common Law Palatinate Courts (now abolished by the Judicature Act, 1873), and the Chancery Court of Durham.

The decree or order must be for the payment of money.

But in order to bring a decree or order of a Court of Equity within the 1 & 2 Vict. c. 110, it must be one "whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person." Thus, a decree for an account, and for payment of what shall be found due thereon, does not entitle the person in whose favour it is made to obtain a charging order, pending the taking of the account (*d*); so, where a decree was obtained against an executor for payment of a certain sum to his testator's estate, with which he was to be charged in taking the accounts in a pending administration suit, it was held that it did not constitute a judgment debt (*e*); so, a decree directing payment to the credit of a cause, is not within the Act (*f*); so, a decree directing payment of costs is not a charge upon land, until the costs have been taxed, and the decree registered (*g*); and a certificate of the chief clerk, finding money due, is not an "order for payment" (*h*): so, the person who seeks to enforce as a charge on land a rule of a Court of Common Law directing payment of money, must be the person to whom the money is payable under the rule (*i*).

Meaning of the term judgment under Acts of 1860 and 1864.

By the 5th section of the 23 & 24 Vict. c. 38, and by the 2nd section of the 27 & 28 Vict. c. 112, the term "judgment," in each of those Statutes, is to include registered decrees, orders of Courts of Equity and Bankruptcy, and other orders having the operation of a judgment. The term is not *expressly* limited to such decrees or orders as direct the

(*d*) *Chadwick* v. *Holt*, 2 Jur. N. S. 918; distinguish *Duke of Beaufort* v. *Phillips*, 1 De G. & S. 321.

(*e*) *Garner* v. *Briggs*, 4 Jur. N. S. 230.

(*f*) *Ward* v. *Shakeshaft*, 1 Dr. & S. 269, 272. But see *Gibbs* v. *Pike*, 6 Jur. 465.

(*g*) *Nortcliffe* v. *Warburton*, 10 W. R. 635.

(*h*) *Lord Mansfield* v. *Ogle*, 5 Jur. N. S. 419. And see *Shaw* v. *Neale*, 20 B. 157; 6 H. L. C. 581.

(*i*) *Crowther* v. *Crouther*, 2 Jur. N. S. 274.

payment of money, or costs, charges, and expenses; but there can be but little doubt that such restrictive construction is the correct one.

Secondly, as to what property of the debtor is affected by judgments under the new law:—

What property extendible under the new law.

Under the provisions of the 1 & 2 Vict. c. 110, and the succeeding Statutes, a creditor may now, (except as against purchasers and mortgagees prior to the 1st October, 1838, and purchasers and mortgagees without notice,) take under an *elegit* the entirety (instead of a mere moiety) of the debtor's property: and this right extends to copyholds, estates over which the debtor has only a general power of appointment, and leasehold estates; upon all of which the judgment can operate: and it is said, that where the interest in a term of years is merely equitable, it is subject to the legal as well as the equitable remedy (*k*). Where the property is of such a nature that it cannot be taken in execution as, *e.g.*, an advowson, an estate in remainder, a reversionary interest, or an equity of redemption, the judgment, or the writ of execution, prior to the 27 & 28 Vict. c. 112, operated as an immediate charge upon the estate, instead of being, as formerly, a mere general lien (*l*); but under that Statute, actual delivery in execution is now necessary to create a charge (*m*).

Judgment an immediate charge in Equity.

Estate of joint-tenant;

It is also observable, that the estate of a joint-tenant is extendible as against the *jus accrescendi* of a surviving joint-tenant, and not, as formerly, merely for the life of the debtor.

of tenant in tail.

It also seems probable that the judgment creditor of a tenant in tail, (where there is a protector,) can take the land

(*k*) See Sug. 524; *Rollestone* v. *Morton*, 1 D. & War. 182, *Gore* v. *Bowser*, 3 S. & G. 1; and see *Wallis* v. *Morris*, 10 Jur. N. S. 741.

(*l*) See 1 & 2 Vict. c. 110, s. 13, *Gore* v. *Bowser*, and *Wallis* v. *Morris*.

(*m*) As to what is a delivery in execution of an equitable interest, see *Hutton* v. *Haywood*, 9 Ch. 229, and *post*, p. 517.

in execution as against the issue in tail, and that the judgment creditor of a tenant in tail, (where there is no protector,) can take the land in execution, not only as against the issue in tail, but also as against remaindermen; and there can be no doubt as to the rights, in Equity, of a judgment creditor of a tenant in tail. Where a judgment creditor filed a bill to realise his charge against a tenant in tail in possession, the latter was ordered to execute a disentailing deed (*n*).

Joint power—how affected.

It also seems probable that the joint donee of a power of appointment, who is entitled to any estate or interest in default of appointment, cannot, by concurring in an exercise of the power, defeat the lien of his judgment creditor upon such estate or interest; as to do so would be to derogate from what is by the Statute made equivalent to his own personal assurance.

Judgment a charge on mortgage debt, annuities, &c., payable out of land.

In *Harris* v. *Davison*, Shadwell, V.-C., with reference to the 13th section of the 1 & 2 Vict. c. 110, said, that he "could not conceive any set of words better adapted to describe every possible interest in lands of every possible description; they are as comprehensive as possible, and include lands of every tenure, except, perhaps, lands held in ancient demesne:" he then decided that a registered judgment operated as a charge upon the beneficial interest of the debtor (the grantee of a personal annuity) under a trust for sale of leaseholds for better securing the payment of the said annuity: so, an annuity charged upon, or issuing out of land has been held to be an interest in land within the Statute (*o*); a like decision was come to in *Russell* v. *M'Culloch* (*p*), as respects a gross sum of money secured by covenant, and by declaration of charge; and the same, it is conceived, must be the rule as to a legacy charged upon land. Where a trust fund was invested upon mortgage, a judgment creditor of one of the *cestuis que trust* was held entitled to a charge on the

(*n*) *Lewis* v. *Duncombe*, 20 B. 398.

(*o*) *Younghusband* v. *Gisborne*, 1 De G. & S 209

(*p*) 1 K. & J. 313, and see *Clark* v. *Wood*, 4 Ha. 81.

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debtor's share of moneys payable out of the rents of the mortgaged property; but not on his share of the interest paid by the mortgagor under his covenant, and not taken from rents (q).

Practical inconveniences resulting from the doctrine.

The decision in *Russell* v. *M'Culloch* seemed to establish, in theory, the necessity of searching for judgments against a mortgagee, upon paying off or taking a transfer or release of the security—and a like necessity in the case of any dealing with an annuity, or, it is conceived, a legacy, respectively charged on land; and it was very difficult to avoid the conclusion that the same precaution ought in strictness to have been taken in paying off, or assigning, or taking a release of a registered judgment debt, it being the statutory equivalent to an equitable mortgage; and that if judgments were found registered against a mortgagee, or against the owner of an annuity or legacy charged on land, the like searches should have been made in the names of his judgment creditors, and in like manner against their *puisne* judgment creditors (if any); and so on, in an infinite series. The practical inconveniences and absurdity of this excessive development of the doctrine laid down in *Harris* v. *Davison*, are self-evident, and were in fact the main argument adduced for disregarding that decision—a decision which, it may be remarked, seems fully warranted by the words of the 1 & 2 Vict. c. 110.

Partially remedied by 18 & 19 Vict. c. 15, s. 11.

There being thus evidently a *nodus vindice dignus*, the Legislature intervened, and by the 11th section of the 18 & 19 Vict. c. 15, enacted that "where any legal or equitable estate or interest or any disposing power in or over any lands, tenements, or hereditaments, shall, under any conveyance or other instrument executed after the passing of this Act, become vested in any person as a purchaser or mortgagee for valuable consideration, such lands, tenements, or hereditaments shall not be taken in execution under any writ of *elegit*, or other writ of execution, to be sued upon any judgment, or any decree, order, or rule against any

(q) *Anson* v. *Holmes*, 1 J. & H. 530.

mortgagee or mortgagees thereof, who shall have been paid off prior to, or at the time of the execution of, such conveyance [or other instrument as aforesaid—*Qy.*]; nor shall any such judgment, decree, order, or rule, or the money thereby secured, be a charge upon such lands, tenements, or hereditaments [which, or any legal or equitable estate or interest in or disposing power over which shall become—*Qy.*], so vested in purchasers or mortgagees, nor shall such lands, tenements, or hereditaments [which, &c.—*Qy. at ante*] so vested in purchasers or mortgagees be extended or taken in execution, or rendered liable under any writ of extent, or writ of execution, or other process issued by or on behalf of her Majesty, her heirs or successors, in respect of any judgment, statute, or recognizance obtained against or entered into by, or inquisition found against, or obligation or specialty made by, or acceptance of office by any mortgagee or mortgagees, whereby he or they had, hath, or have become or shall become a debtor or accountant, or debtors or accountants to the Crown, where such mortgagee or mortgagees shall have been paid off prior to or at the time of the execution of such conveyance [or other instrument—*Qy.*] as aforesaid."

Remarks on 18 & 19 Vict. c. 15, s. 11.

This enactment, it will be observed, does not expressly provide for the several cases of Crown debts and liabilities and judgments affecting annuitants, legatees, judgment creditors themselves, vendors claiming a lien in respect of unpaid purchase-money (*r*), and all other persons having pecuniary charges upon land, except mortgagees; but there can be little or no doubt that persons claiming, not as mortgagees strictly so called, but under securities by way of conveyance in trust to sell, or operating only to create a charge or incumbrance, without conferring any right of foreclosure (*s*), come within its provisions. Doubts may, however, be suggested whether it provides for the simple case of paying off a

(*r*) See and consider *Hood* v. *Hood*, 3 Jur. N. S. 684; and the similar wording of 17 & 18 V. c. 113.

(*s*) See *Bell* v. *Carter*, 17 B. 11; *Re Underwood*, 3 K. & J. 715.

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mortgage, without reference to a sale or a re-mortgage; or for the case of a trustee, where the mortgage is not *paid off*, but the debt is assigned and kept on foot, as is often desirable even upon a sale; or for the case of judgments against a puisne mortgagee where concurrence is required to a sale of part of the land, although the purchase-money is received by the first incumbrancer; or for the case of a mortgagee releasing part of the land in consideration of a substituted security being given for the debt, or in reliance on the sufficiency of his remaining security. Nor does it appear, so clearly as could be wished, that a sale by a mortgagee, under the usual power, of part of the land, when the sale realizes only a portion of the mortgage debt, is within the enactment; but there can be no reasonable doubt that it would be held to be so; as the mortgagee would in fact be paid off, *quâ* the particular land comprised in the sale. It has been held under this section that, whether the mortgage be prior or subsequent to the passing of the Act, a *bonâ fide* purchaser acquires a valid title as against registered judgment creditors of the mortgagees, provided that the mortgage be paid off previously to, or at the time of, the execution of the conveyance (*t*).

Judgment is a charge on unpaid purchase-money, &c.

A judgment entered up against the vendor after a contract for sale, as formerly, may be enforced against the unpaid purchase-money; although execution cannot be levied upon it (*u*): and, upon a sale by a mortgagee, the surplus proceeds of sale may be resorted to for the discharge of judgments entered up against the mortgagor subsequently to the mortgage (*x*).

Not a sale for value within 27 Eliz. c. 4.

A judgment creditor is not a purchaser for value within the 27 Eliz. c. 4, so as to avoid a prior voluntary settlement (*y*).

(*t*) *Greaves* v. *Wilson*, 25 B. 434.

(*u*) *Brown* v. *Perrott*, 4 B. 585.

(*x*) *Robinson* v. *Hedges*, 11 Jur. 784.

(*y*) *Beavan* v. *Lord Oxford*, 6 D. M. & G. 507; see, as to Ireland, 12 & 13 V. c. 95, s. 6.

Nor does a judgment operate as a charge upon an ecclesiastical benefice; the words "rectories and tithes," in the 11th and 13th sections of the 1 & 2 Vict. c. 110, having reference only to lay rectories and tithes (*z*).

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Not a charge on an ecclesiastical benefice.

But a judgment on a bond of a municipal corporation will operate as a charge on all lands and hereditaments of the corporation (*a*).

A charge on municipal lands.

We may here remark that, by the 30 & 31 Vict. c. 127, s. 4, the rolling stock and plant of a railway company are for the future protected from being taken in execution; but a receiver, and, if necessary, a manager of the undertaking, may now be appointed, on the petition of the judgment creditor; and the moneys paid to such receiver or manager will be applied and distributed under the direction of the Chancery Division (*b*).

Railway plant exempted from execution.

We have already seen that the judgment creditor can now take under an *elegit* the entirety, instead of a mere moiety, of the debtor's land; and that several kinds of property, which were not extendible under the old law, are now liable to be taken in execution. It does not, however, appear, that the creditor has acquired any remedy at Law against equitable estates, except in cases of simple trusts in favour of the debtor: *e.g.*, it is conceived that an equity of redemption cannot be taken in execution (*c*); but that land held simply in trust for the debtor at the date of the judgment can under the 10th section of the Statute of Frauds (*d*)

Creditor's extended rights at law;

(*z*) *Hankins* v. *Gathercole*, 6 D. M. & G. 1; *Long* v. *Stone*, 3 De G. & S. 308, *Cattle* v. *Warrington*, 2 N. & M. 227; *Bates* v. *Brothers*, 2 S. & G. 509, *Wise* v. *Beresford*, 3 D. & War. 276.

(*a*) *Arnold* v. *Mayor, &c. of Gravesend*, 2 K. & J. 574; but see *Arnold* v. *Ridge*, 13 C. B. 745.

(*b*) See, as to the meaning of the section, *Re Manchester & Milford R. Co.*, 14 Ch. D. 645, and *Re Southern R. Co.*, 5 L. R. Ir. p. 165, for form of Order, see Seton, 122.

(*c*) *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275, *Re Pope*, 17 Q. B. D. 743.

(*d*) 29 C. II. c. 3, cl. Elph. & Cl. 7 *et seq.* The section only extends to a simple trust, which af-

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be taken in execution, notwithstanding intermediate alienation (otherwise than to an alienee for valuable consideration).

In Equity.

In Equity, the judgment creditor is, under the 13th section of the 1 & 2 Vict. c. 110, to have the same remedies against the hereditaments charged, as he would be entitled to if the person against whom the judgment has been entered up had power to charge, and had in writing agreed to charge, the same hereditaments with the amount of the judgment debt and interest: but he is not to proceed in Equity to obtain the benefit of such charge, until a year has elapsed from the entering up of the judgment. A written agreement to charge being in Equity identical in effect with an actual charge, the judgment creditor is by this section placed in the position of an equitable incumbrancer under a memorandum of charge, subject only to the restriction as to the time when his judgment charge is to be enforceable. It is not, however, necessary that a year should have elapsed since the registration of the judgment (*e*); and the Court will, within the year, interfere at the suit of the judgment creditor, to prevent the destruction of the property, although no substantial relief can be obtained until the year has expired (*f*). Before the Judicature Act, 1873, a writ of *elegit*, and not merely a *fi. fa.*, must have issued before the Court would interfere (*g*); but now, under one system of judicature, this idle form may be dispensed with (*h*), nor is it necessary, for the purpose of getting a

fects the debtor's interest only, and which does not include the interests of others to which the debtor [illegible] v. *Bank of Ireland*, 4 Ball. 504. The effect of the statute 1 & 2 Vict. c. 110 is to extend the remedy to the whole of the debtor's land, instead of confining it to a moiety; and subject to this change the statute affects only procedure.

(*e*) *Derbyshire, &c. R. Co.* v. *Bumsbridge*, 15 B. 116.

(*f*) *Vernon* v. *London*, 28 B. 80; *Rutter* v. *Tucker*, 31 B. 1; and see *Wills* v. *Jeffries*, 3 M. & G. 372; *Re Bank of Nova Scotia*, 8 Eq. 700; *Ashby-Pearson Bank* v. *Dunn*, 9 Ch. D. 275.

(*g*) *Smith* v. *Hurst*, 1 Coll. 705; 10 Ha. 30; and see cases cited in last note, and *Neth* v. *Duke of Marlborough*, 3 M. & C. 407, 415; *Godfrey* v. *Tucker*, 33 B. 280.

(*h*) *Ex p. Lewis, Re Watkins*, 13 Ch. D. 252.

receiver appointed, that the judgment creditor should commence a fresh action (i). Chap. XI. Sect. 2.

Registration has no restrospective effect, so as to make the judgment, when registered, operate against purchasers or mortgagees as a charge from the date of its being entered up (k). So a certificate of the taxation of costs must be registered, and operates only from the date of registration (l). Registration does not operate retrospectively.

It has been much doubted whether the proper remedy, in Equity, for the judgment creditor, is sale or foreclosure (m). In one case, where the authorities were fully reviewed, it was held by V.-C. Wood that the proper remedy for an equitable mortgagee, who has not an agreement for a legal mortgage—a position analogous to that of the judgment creditor—is sale, and not foreclosure (n); and this decision was generally accepted and followed. But in one case (o), which has since been frequently followed, it was held on the authority of an unreported case of *Pryce* v. *Bury* (p) before the Court of Appeal, that the appropriate remedy for an equitable mortgagee is foreclosure, not sale. Under section 25 of the Conveyancing Act, 1881, an equitable mortgagee is now entitled to a sale where he can obtain foreclosure (q). It is, however, conceived that this section does not entitle a judgment creditor to a sale before the lapse of a year since the date of entering up judgment (r). Whether in Equity the remedy is sale or foreclosure.

But the 27 & 28 Vict. c. 112, has provided a more summary remedy, in Equity, for the judgment creditor. By Summary order for sale may now be

(i) *Smith* v. *Cowell*, 6 Q. B. D. 75; see also *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275; *Salt* v. *Cooper*, 16 Ch. D. 544; where the writ was not indorsed with a claim for a receiver.

(k) *Hargrave* v. *Hargrave*, 23 B. 484.

(l) *S. C.*

(m) Sale directed in *Footner* v. *Sturgis*, 5 D. G. & S. 736; *Simpson* v. *Morley*, 2 K. & J. 71; *Smith* v. *Hurst*, 10 Ha. 50; and see *Carlon* v. *Farlar*, 8 B. 525. Foreclosure directed in *Jones* v. *Barlow*, 17 B. 582; *Ford* v. *Wastell*, 6 Ha. 220; *Messer* v. *Boyle*, 21 B. 559.

(n) *Tuckley* v. *Thompson*, 1 J. & H. 126. But see Seton, 826, 827.

(o) *James* v. *James*, 16 Eq. 153.

(p) 16 Eq. 153, n. See Fisher, 484 *et seq.*; and *post*, p. 1320.

(q) *Oldham* v. *Stringer*, 33 W. R. 251.

(r) 1 & 2 V. c. 110, s. 13.

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Obtained in Equity.

the 4th section it is enacted, that every creditor, to whom any land of his debtor shall have actually been delivered in execution by virtue of any judgment under that Act, and whose writ, or other process of execution, shall be duly registered, shall be entitled forthwith, or at any time afterwards, while the registry of such writ or other process shall continue in force, to obtain from the Court of Chancery by petition (s), in a summary way, an order for sale of his debtor's interest in such land; and every such petition may be served upon the debtor only; and thereupon, the Court is to direct all necessary and proper inquiries as to the nature and particulars of the debtor's interest in the land, and his title thereto; and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the Court, with respect to sales of real estates of deceased persons for the payment of debts, is to be adopted and followed, as far as the same may be found conveniently applicable. If, on making such inquiries, it appears that any other debt due on any judgment, &c., is a charge on the land, the creditor entitled to such charge (whether prior or subsequent to the charge of the petitioner) is to be served with notice of the order for sale, and after such service is to be bound thereby; and the proceeds of such sale are to be distributed among the persons who may be found entitled thereto according to their respective priorities (t); and all parties claiming interest through the debtor are to be bound by the order for sale (u). These provisions, it must be observed, are merely prospective; and a creditor, to whom the land has been delivered in execution under a judgment entered up prior to the Act, is not entitled to a summary order for sale (v).

Construction of the 27 & 28 Vict. c. 112.

The true construction of the 27 & 28 Vict. c. 112 has been the subject of much discussion. By the first section, to which we have already referred, no judgment is to *affect* any land of whatever tenure until it has been *actually delivered in execution*

(s) For form of petition, see Dan. Ch. Forms, 415.

(t) Sect. 5.

(u) Sect. 6.

(v) *Re Lord Wight Peerage*, 11 Jur. N. S. 276.

by virtue of a writ of *elegit*, or other lawful authority (*a*), in pursuance of such judgment; and the summary remedy provided by the 4th section is expressly confined to cases where there has been such an actual delivery, and the writ or other process of execution has been registered under the 3rd section. These provisions, if construed literally, and without reference to the context, can only mean that, except in the comparatively few cases where the debtor's land is capable of being delivered in execution, and has actually been so delivered, no future judgment was to operate as a charge on land. But the object of the Statute, as stated in the preamble, is to assimilate the law affecting freehold, copyhold, and leasehold estates, to that affecting purely personal estate in respect of future judgments; and if the Legislature had intended at once to deprive the judgment creditor of all his extended remedies under the 1 & 2 Vict. c. 110, this would surely have been provided for by express enactment, and not have been left to mere surmise. Moreover, by the 2nd section the term "land" is to include incorporeal hereditaments, and *any* interest, *e.g.*, a reversionary interest, in corporeal hereditaments (*i.e.*, property not capable of being taken in execution); and the 5th section speaks of charges "*prior* or subsequent to the charge of the petitioner." Clearly, therefore, the Statute contemplates the case of a judgment creditor, who may secure a charge under the Act, and be entitled to the summary remedy in Equity which it provides, although not in actual possession under a writ of *elegit* (*z*).

Cases of *Re Corbridge R. Co.*

In two cases, in which the question of what was intended by "actual delivery" was very fully considered, it was held that, before a judgment creditor can apply by petition under the Act, he must have got that which is the nearest equivalent to being put in possession, *viz.*, a return to the writ actually

(*a*) As to the meaning of which, see *Hatton* v. *Haywood*, 9 Ch. 229, *R South*, *ib.* 373, and *post*, p. 547.

(*z*) See now *Hatton* v. *Haywood*, 9 Ch. 229, *Re South*, *ib.* 373; *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275.

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placed in the hands of the Sheriff (a); but he is not prevented from bringing an action to redeem a prior judgment creditor to whom the land has been delivered: and, having thus removed the legal obstacle, he may then petition for a sale under the Statute (b); and it has been held that the priorities of the judgment creditors *inter se* are determined not by the dates of the judgments, but by the dates at which the writs are placed in the hands of the sheriff (c).

Re Duke of Newcastle.

In a later case of *In re The Duke of Newcastle* (d), the Duke was entitled to an equitable life interest in a leasehold messuage; a judgment creditor, having issued a writ of *fi. fa.*, under which the sheriff entered and sold the debtor's goods, presented a petition, while the sheriff was in possession, for a summary order for sale of the Duke's interest in the house, under the 4th section of the 27 & 28 Vict. c. 112. Lord Romilly held, first, that the Duke's interest could not be taken in execution under a writ of *fi. fa.*; and, secondly, that the summary relief provided by the 4th section of the Act of 1864 applies only in cases where there has been an actual delivery in execution.

Remarks on those cases.

In the cases to which we have just referred, the Court, it will be seen, treated the words "actually delivered in execution" as used in their strict technical sense, and not as importing what we may term an equitable delivery of the land in execution; and accordingly, applying a *ex-parte* rule, held that an enforcement of the legal process down to the sheriff's return to the writ, was, as respects the debtor's equitable interest, a delivery in execution within the meaning of the Act.

Hatton v. Haywood.

But in *Hatton v. Haywood* (e), a new construction was put

(a) *R. v. Cumberlidge*, R. 1 Ex. 5 Ex. 41; *Gow v. Forster*, R. 6 Ch. 6 Eq. 19. But see now and compare *Hatton v. Haywood*, 9 Ch. 229.

(b) *R. v. Cumberlidge*, R. 1 Ex. 5 Ex. 41; *Gow v. Forster*, R. 6 Ch. 6 Eq. 19. But see now and compare *Hatton v. Haywood*, 9 Ch. 229.

(c) *R. v. Cumberlidge*, R. 1 Ex. 5 Ex. 41; *Gow v. Forster*, R. 6 Ch. 6 Eq. 19. But see now and compare *Hatton v. Haywood*, 9 Ch. 229.

(d) *In re The Duke of Newcastle*, 5 Eq. 709.

(e) *Hatton v. Haywood*, 9 Ch. 229. *R. v. South*, 9 Ch. 227; and see *Ex parte Brook v. Lewis*, 9 Ch. D. 275; *South v.*

upon the Statute. In that case a judgment creditor sued out an *elegit* against his debtor, whose only interest in land was an equity of redemption. After the sheriff had returned *nul*, the debtor was adjudicated bankrupt, and the judgment creditor then filed his bill against the trustee for a declaration of charge in the debtor's equitable interest, and for consequential relief. The Court of Appeal, affirming V.-C. Malins, who had allowed a demurrer to the bill, laid it down that the term "delivery in execution" must be understood according to the subject-matter,—that it was not confined to a delivery at law by the sheriff; but that a delivery, or what was tantamount to a delivery, "by any other lawful authority," satisfied the language of the Statute; and consequently that the relief given by a Court of Equity, whether by way of a writ of assistance or sequestration or the appointment of a receiver, is substantially a delivery in execution within the Act (*f*).

According to this decision a judgment creditor who cannot obtain possession of the land under the *elegit* has no charge upon his debtor's interest in it until he has obtained some relief, either by a decree, or by an interlocutory order of the Chancery Division in an action to enforce his equitable charge; and the Court has now jurisdiction to appoint a receiver even where the legal remedy is open to the creditor (*g*). Accordingly it has since been held (*h*) that there is no reason why he should be required in the first instance to go through the idle form of prosecuting legal remedies, which can be productive of no result, instead of at once availing himself of his only effectual means of relief (*i*); and

Cowell, 6 Q. B. D. 71; *Salt* v. *Cooper*, 16 Ch. D. 544.

(*f*) 9 Ch. 373; where the property was an estate in remainder.

(*g*) Jud. Act, 1873, s. 25, sub-s. 8; *Re Pope*, 17 Q. B. D. 743.

(*h*) *Ex p. Evans, Re Watkins*, 13 Ch. D. 252; and see *ante*, pp. 542, 543.

(*i*) As to the necessity, before the Judicature Act, 1875, of first pursuing the legal remedy before resorting to Equity, see *Walker* v. *Morris*, 10 Jur. N. S. 741; *Godfrey* v. *Tucker*, 9 Jur. N. S. 1188; *Partridge* v. *Foster*, 34 B. 1; *Thomas* v. *Cross*, 2 Dr. & S. 423.

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there is apparently no reason why the priorities of judgment creditors *inter se* should be determined according to the dates at which the writs are placed in the sheriff's hands, and not by the order in which they obtain an effectual charge on the land or the debtor's equitable interest in it.

In one case (*k*), Sir George Jessel, M. R., held that a judgment creditor, who, by reason of an outstanding legal estate or incumbrance, could not obtain possession of the land under his *elegit*, was not bound to file a bill for redemption; but might, in a suit to which the debtor and subsequent incumbrancers were alone parties, obtain a decree for the appointment of a receiver and a sale of the property (*l*).

When a sale will be ordered under 27 & 28 Vict. c. 112.

Where it is not clear that the debtor has a saleable interest in the land delivered in execution, the Court will not order an immediate sale; but will direct inquiries as to the nature of the debtor's interest: and if it should be found unsaleable, the case appears not to fall within the 4th section (*m*).

Judgment creditor postponed to *cestui que trust*, or prior equitable incumbrancer.

When it is said that a judgment operates as a charge upon land, what is meant is, that where a debtor has merely a modified or qualified interest in the lands,—as where he holds them wholly or in part as a trustee or subject to any previous incumbrance, whether legal or merely equitable,—the judgment must be considered as the statutory equivalent to his written agreement to charge not the lands themselves, but merely that which he may rightfully charge, *viz.*, his beneficial interest (if any) in them; so that the judgment creditor, although he subsequently acquire the legal estate, is post-

(*k*) *Wells* v. *Kilpin*, 18 Eq. 298, but see and compare *Jones* v. *Jones*, 16 Eq. 153; *Beckett* v. *Buckley*, 17 Eq. 435.

(*l*) See 18 Eq. 300, for form of decree.

(*m*) *Re Bishop's Waltham R. Co.*, 2 Ch. 352, and as to form of order for sale of superfluous lands of a railway company under this section, see *Ex Hull and Hornsea R. Co.*, 2 Eq. 262; *Gardner* v. *L. C. & D. R. Co.*, 2 Ch. 201; *Ex Calne R. Co.*, 9 Eq. 8; and see Fisher, 487.

poned to a *cestui que trust*, or a prior equitable incumbrancer who advanced his money upon the security of the specific property (*n*).

Where judgment creditor, prior to registration, has not issued writs of charge.

In one case (*o*) it was held that judgment creditors, whose judgments were not a charge on the land at the date of the decree in a foreclosure suit, were entitled to redeem if within the six months allowed for redemption they issued writs of *elegit*: but, in a later case (*p*), this decision was disapproved; and it was held that judgment creditors who had not issued execution were not necessary parties to a foreclosure suit.

Watts v. Porter.

In a modern case, a majority of the Court of Queen's Bench held that a mortgage of an equitable interest in stock, where the mortgagee had omitted to give notice of the charge to the trustees, must be postponed to a charging order obtained under sect. 14 of 1 & 2 Vict. c. 110, by a subsequent registered judgment creditor (*q*). This case, although professedly decided in accordance with the decisions above referred to, on the 13th section, is very difficult to be reconciled with them; and the masterly judgment of the dissentient member of the Court, Erle, J., offers reasons in support of his opinion which many will deem to be unanswerable (*r*).

Recent cases.

In a later case, it was held that a judgment entered up by an heir for his own debt, before any action or suit by simple contract creditors of the ancestor, had no priority over their claims under the 3 & 4 Will. IV. c. 104, in respect of the descended real estate (*s*). So, an equitable assignee of stock, whose mortgage was subsequent to the judgment, but before the charging order, was held entitled to priority over the

(*n*) *Whitworth* v. *Gaugain*, 1 Ph 728, and cases cited *post*, p 550, see, too, Elph. & C. 11.

(*o*) *Middleton* v. *Austin*, 8 Eq 220

(*p*) *Earl of Cork* v. *Russell*, 15 Eq. 210.

(*q*) *Watts* v. *Porter*, 3 E & B 373

(*r*) And see judgment in *Berman* v. *Lord Oxford*, 6 D M. & G 492, 524, 525, 532, where the decision in *Watts* v *Porter* was disapproved. And see under the equivalent Irish Acts, *Fyne* v *McDonell*, 3 H. L. C. 619, 642

(*s*) *Kinderley* v *Jervis*, 22 B 1

judgment creditor, although he had omitted to give notice of his security (*t*); and, in a later case, it was laid down, that where a judgment creditor had notice of a prior mortgage, or a mortgagee had notice of a prior unregistered judgment, each was equally postponed; in the former case, because the debtor had parted with his interest; in the latter, because the mortgagee, having notice of the prior incumbrance, could not, by contract, place himself in a better position than his mortgagor, who might not derogate from an interest which he had already created (*u*): but that as between judgment creditors this principle had no application; the judgment creditor gaining his position by proceedings *in invitum;* so that, notwithstanding notice of a prior unregistered judgment, his judgment, if first registered in the County Register, would have priority (*x*). So, under the 27 & 28 Vict. c. 112, the priority of judgment creditors *inter se* is regulated according to the times when the several writs are placed in the sheriff's hands (*y*). Where, however, the transaction, though in form a judgment, is in truth a contract, as where money is agreed to be advanced upon the security of certain land, and the judgment is only the mode of carrying out the contract, the principle above stated would probably be held to apply (*z*). It may be here stated that an execution creditor is not in the position of a purchaser, and that the rule as to obtaining priority by notice does not apply to him (*a*).

Priorities of judgment creditors *inter se;*

under the Act of 1861.

Release of part of land charged not to affect judgment.

By the 11th section of the 22 & 23 Vict. c. 35, the release from a judgment of part of any hereditaments charged therewith, is not to affect the validity of the judgment as to the hereditaments remaining unreleased; but this provision is not

(*t*) *Scott* v. *Lord Hastings*, 1 K. & J. 633, see V.-C. Wood's judgment, *Riley* v. *Jones*, 5 Ch. 171, and cases therein cited; *Pentlebury* v. *Pentlebury*, 1 De G. & Sm. [illegible]

(*u*) *Jackson* v. *Jones*, 3 De G. & J. 318, *Neve* v. *Pell*, [illegible] and [illegible]

(*x*) [illegible] v. [illegible], [illegible] E. 649.

(*y*) *Jackson* v. *Kemp*, 1 De G. & J. 318, and see [illegible] v. *Lewis*, 5 H. L. C. 872.

(*z*) *Jones* v. *Jones*, 2 Ch. D. 79[illegible], *Lord* [illegible] v. *Lord*, 3 Ch. D. 7[illegible] and [illegible] v. *Wordsworth*, 2 Ch. D. 512, where the principle was applied to a mortgage.

to affect the rights of persons interested in the hereditaments remaining unreleased (*b*).

Remedies under new law depend upon registration.

The remedies of the judgment creditor depended, as we have seen, upon the due registration of the judgment, until the Act of 1860 added registration of the writ of execution, and that of 1864 substituted delivery in execution, together with registration of the writ or other process, in cases where the judgment creditor desired a sale of the lands (*bb*). Under the 1 & 2 Vict. c. 110 (*c*), judgments did not affect lands, &c., as against purchasers, mortgagees, or creditors, until they had been registered in the manner specified in the Act. By the 2 & 3 Vict. c. 11, the old dockets were closed; and judgments then docketed were not to affect lands, &c., as against purchasers, mortgagees, or creditors after the 1st of August, 1841, until a memorandum thereof was left for registration at Westminster under the 1 & 2 Vict. c. 110; and as respects judgments registered at Westminster, a fresh memorandum was required to be left for registration every five years (*d*); so that in no case need a search at Westminster (now in the Central Office) extend back for more than five years; but the search for the five years preceding the purchase should theoretically be made, not only as against the present vendor, but also against former owners, although more than five years may have elapsed since they parted with the property (*e*).

1 & 2 Vict. c. 110.

2 & 3 Vict. c. 11.

Registration of writs of execution under the Act of 1860.

By the first section of the 23 & 24 Vict. c. 38, which is not retrospective (*f*), before a judgment can affect land (of whatever tenure), as against a purchaser or mortgagee, whether with or without notice, a writ of execution must have been issued, and registered before the conveyance or mortgage:

(*b*) Cf. on the analogous 10th section, *Booth* v. *Smith*, 11 Q. B. D. 318; the Irish Act, 11 & 12 V. c. 48, s. 72; *Hancock* v. *Hancock*, 1 Ir. Ch. R. 111.

(*bb*) See Elph. & C. 35, 43.

(*c*) Sects. 19 and 21.

(*d*) See sects. 1, 2, and 4 of 2 & 3 V. c. 11.

(*e*) See as to misnomer, *Beacon* v. *Lord Oxford*, 3 S. & G. 11; *vide post*, p. 560.

(*f*) *Vide ante*, p. 532; and see *Evans* v. *Williams*, 2 Dr. & S. 324.

and the execution must be put in force within *three* calendar months from the date of the registration of the writ: and by the 2nd section a memorandum is to be left with the senior Master of the Common Pleas, who is to enter the particulars in a book in the name of the person *on whose behalf* the writ was issued; and all persons are to be at liberty to search this book, in addition to all the other books in the same office, on payment of the sum of one shilling. These provisions are extended to the Palatine Courts, but not to Ireland.

Cannot be registered at the end of the three months;

Under this Statute a registered judgment, under which the land has not been actually delivered in execution, instead of being a charge of indefinite duration, if kept alive by the process of re-registration, was made a charge upon the land only while a writ of execution was in force, *viz.*, for a period of three calendar months from the date of registration. There is no provision for the re-registration of the writ at the end of the three months, and it is the practice at the office to refuse re-registration, as not being authorized by the Statute (*h*); but there would seem to be nothing to prevent the registration of a second, or any subsequent, writ on the same judgment.

but a fresh writ on the same judgment may be registered, *semble*.

Registration under the Act of 1864.

By the 27 & 28 Vict. c. 112, which also is merely prospective, no judgment is to affect land until such land has been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority. The writ or other process of execution is to be registered in the name of the *debtor*, thus avoiding the necessity of a double search; and no prior or other registration of the judgment is to be deemed necessary *for any purpose:* and the summary relief provided by the 4th section must be obtained *while the registry of the writ continues in force*. As this Act, like the 23 & 24 Vict. c. 38, does not provide for re-registration of the writ, the meaning of this qualifying expression is far from clear. But except for the

(*h*) See Pask on these Acts, p. 9.

purpose of putting in force his remedies under the 4th section, a judgment creditor is under no obligation to register the writ or other process under the 3rd section (*i*).

Neglect to re-register within five years—effect of.

Where a judgment is re-registered after the expiration of more than five years from the date of the last registration, there is nothing in the 2 & 3 Vict. c. 11, to affect its validi[illegible] except as against purchasers or mortgagees claiming unde[illegible] an instrument executed between the expiration of such period of five years and the subsequent registration (*k*). Any doubts which had existed were prospectively removed by the 6th section of the 18 & 19 Vict. c. 15, s. 6, which enacted that it should be sufficient to bind purchasers, &c., if a minute were again left with the senior Master of the Common Pleas within five years before the execution of the conveyance, &c., although more than five years should have expired by effluxion of time since the last previous registration before such minute was left; and so [illegible] *s quotiens* upon every re-registry.

Provisions as to registration not merely for the benefit of *immediate* purchasers, &c.

We may also remark that the provisions as to registration are operative not merely for the protection of the debtor's immediate purchasers and mortgagees, but also for the benefit of all derivative *bonâ fide* purchasers and mortgagees (*l*): but where a purchaser or mortgagee has once been duly bound by notice of a registered judgment, the neglect of re-registration within the five years will not relieve him. It is hardly necessary to observe that where the title is derived otherwise than through the judgment creditor, as, *e.g.*, in the case of a lord taking by escheat, the statute does not apply.

Re-registration of judgments in Palatinate Courts.

No provision was originally made for the fresh registration of judgments, &c., in the Palatinate Courts of Lancaster

(*i*) *Re Pope*, 17 Q. B. D. 743.

(*k*) *Beavan* v. *Lord Oxford*, 6 D. M. & G. 492; *Shaw* v. *Neale*, 6 H. L. C. 581; *Freer* v. *Hesse*, 4 D. M. & G. 495; *Simpson* v. *Morley*, 2 K. & J. 71; 18 & 19 V. c. 15, s. 6; *Re Lord Kensington*, 29 Ch. D. 527.

(*l*) *Benham* v. *Keane*, 1 J. & H. 685; 3 D. F. & J. 318. See and consider judgments.

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and Durham; the 4th section of the 2 & 3 Vict. c. 11, referring merely to those judgments, &c., which must be originally registered with the senior Master of the Court of Common Pleas at Westminster; but this omission was supplied by the 18 & 19 Vict. c. 15 (*m*). We may here remark, that since lands in a County Palatine may be extended on a judgment obtained in the High Court of Justice (*mm*), it will be proper to search the register in the Central Office, in addition to the local register.

Purchaser with notice of unregistered judgment, how far liable.

A purchaser with notice of an unregistered judgment is protected (*n*) from the additional remedies of the judgment creditor under the 1 & 2 Vict. c. 110; and, since the old dockets are closed, he is equally safe from any remedy which, under the old law, depended upon docketing; but it was conceived to be doubtful whether a purchaser with notice of an unregistered judgment was not still bound in Equity to the same extent as he would have been bound under the old law by notice of an undocketed judgment (*o*); for instance, whether, if purchasing from an owner in fee simple, he would not be liable in Equity to have a moiety of the land subjected to the claim of a creditor of whose unregistered judgment he had notice at the time of advancing his money; although if purchasing under a power of appointment, he might altogether disregard unregistered judgments against the vendor of a date subsequent to the creation of the power; inasmuch as, under the old law, the exercise of the power defeated such judgments as well in Equity as at Law. It was even made a question whether a purchaser might not at Law be bound by a judgment, neither docketed nor registered, in the same way as he would have been bound by it before the Act of William and Mary (*p*):

(*n*) S. 3 and cor. v. 23 & 24 V. c. 38, s. 2.

(*mm*) *Draper* v. *Blanco*, 2 Saund. 194.

(*m*) 3 & 4 V. c. 82, *quære* as to Palatinate judgment. See as to decrees of the Lancaster Court of Chancery, 13 & 14 V. c. 43, s. 24; 23 & 24 V. c. 38, s. 2.

(*o*) But see *Beere* v. *Head*, 3 J. & L. 519. *R. Hutchinson*, 2 Ir. Ch. R. 54.

(*p*) Coote on Mortgages, 109, 110. And see *Jortin* v. *S. L. R. Co.*, 6 D. M. & G. 275.

but the point did not seem to be one of real difficulty: except as respects Palatinate judgments which never required docketing (*q*). Both these points are now disposed of in the negative (*r*).

Purchaser with notice of a docketed judgment not registered under 1 & 2 Vict. c. 110, how far liable.

It was the opinion of Lord St. Leonards that where a judgment had been once docketed under the old Acts, but had not been registered under the 1 & 2 Vict. c. 110, or where a judgment having been registered under that Act had not been re-registered at the end of five years, under the 2 & 3 Vict. c. 11, a purchaser for value, although aware of its previous docketing or registration, might presume that it had been satisfied (*s*): and this principle was carried out in the 18 & 19 Vict. c. 15 (*t*).

Local registers, whether affected.

It was held by Lord Cranworth, V.-C., in a case under the West Riding Register Act (*u*), that a judgment creditor, duly registering under the 1 & 2 Vict. c. 110, but omitting to register under the Local Act, is not an incumbrancer upon the land at Law or in Equity (*x*): in a later case, under the Middlesex Act (*y*), V.-C. K. Bruce declined to follow this decision (*z*): but it is now clearly settled that the Local Registry Acts have not been repealed by the judgment Acts (*a*).

Satisfaction of judgments how entered up.

The 23 & 24 Vict. c. 115 (*b*), has provided greater facilities for entering on the register satisfaction of a registered judgment, *lis pendens*, decree, order, rule, annuity, rent-charge,

(*q*) See Williams' R. P. 4th ed. p. 68.

(*r*) 18 & 19 V. c. 15, ss. 4, 5.

(*s*) *Beere* v. *Head*, 3 J. & L. 340; *Bedford* v. *Forbes*, 1 C. & K. 33; and, upon the Irish Acts, *Knox* v. *Kelly*, 1 D. & Wal. 512; *Hickson* v. *Colles*, 1 J. & L. 94; *Ex parte Belfast Harbour Commissioners*, 5 Ir. Jur. 35.

(*t*) See s. 5.

(*u*) 6 Anne, c. 20 (Ruff. 5 Anne, c. 18).

(*x*) *Johnson* v. *Holdsworth*, 1 Sim. N. S. 106.

(*y*) 7 Anne, c. 20.

(*z*) *Robinson* v. *Woodward*, 4 De G. & S. 562.

(*a*) *Benham* v. *Keane*, 1 J. & H. 685; 3 D. F. & J. 318, in which the prior decisions were fully reviewed; *Nice* v. *Flood*, 33 B. 666; *Westbrook* v. *Blythe*, 3 E. & B. 737.

(*b*) S. 2.

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or writ of execution, and for the issue of certificates of the entry of such satisfaction. Where the requirements of this Statute cannot be complied with, a rule or order of a Court of Common Law or Equity directing satisfaction to be entered upon the record of the judgment, must be obtained (c).

Judgments obtained in one part of the kingdom enforceable in other parts.

By the 31 & 32 Vict. c. 54, facilities have been given for enforcing judgments obtained in one part of the United Kingdom in the Courts of another part. When judgment has been obtained or entered up in any of the Courts of Westminster (now the High Court), a certificate thereof registered in Ireland is as from the date of such registration to have the effect of a judgment obtained or entered up there, or *vice versâ*; and registers are provided for the entry of such certificates (d): so, also, judgments obtained or entered up at Westminster (now in the High Court) or in Ireland are in like manner to have the effect of a decreet of the Court of Session in Scotland (e); and there is a similar provision as to the registration at Westminster (now in the High Court) and in Ireland of certified extracts of Scotch decreets (f); but in all these cases the certificate cannot, without special leave, be registered more than twelve months after the date of the judgment or decreet; the Courts in which the certificates are registered are invested with the same powers as they possess in respect of their own judgments, but only so far as relates to execution under the Act (g).

We now return to the inquiry with which this digression commenced, *viz.*, how far the relation of vendor and purchaser is affected by the present law of judgments, and, in particular, what searches in respect of judgments ought to be made on behalf of an intending purchaser.

General effect of recent

To sum up the above statement of the law, as to judgments

(c) 16 & 17 V. c. 113, s. 144. For the rules of the office as to entry of satisfaction, see Pask on the Judgments Law Amendment Acts, pp. 31—34.

(d) S. 1. (e) S. 2.

(f) S. 3. (g) S. 4.

statutes on the law of judgments.

entered up before the 23rd July, 1860, these may be disregarded, unless they have been registered and re-registered within five years prior to the search; and these judgments, even if re-registered, carry with them, as against purchasers without notice, only the remedies and operation which obtained under the old law. As to judgments entered up between the above date and the 29th July, 1864, in order to affect a purchaser, these must not only have been re-registered within five years before the date of the search, but execution must have been issued and registered before the completion of the purchase, and put in force within three calendar months of the date of registration. As to judgments entered up since the 29th July, 1864 (*i. e.*, under the present law), these may be disregarded by the purchaser, unless there has been actual delivery in execution, or equitable execution by the appointment of a receiver has taken place.

What searches should be made.

The search for judgments should be made for a period of five years. The register will disclose the date of entering up the judgment: if it was entered up before the 23rd July, 1860, and has been duly re-registered, the purchaser will still be bound by it, although no execution may have issued thereon, or been registered. If it was entered up between the 23rd July, 1860, and the 29th July, 1864, then a further search must be made in the creditor's name for a registered writ of execution; if any be found, it must be ascertained whether the writ has been executed; if it has not, and if three months have elapsed from the registration of the writ, both the registered judgment and writ of execution may be disregarded. If the judgment has been entered up since the 29th July, 1864, a search should be made in the debtor's name in the list of registered executions, whether his interest in the land can be reached by an *elegit* or not.

Danger in spite of searches.

But the purchaser's real difficulty begins where the proper searches end; and behind them all lurks a most serious danger. That difficulty is to ascertain whether the land has been delivered in execution under a writ of *elegit*, or by

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means of equitable execution. The actual delivery in execution is, in the case of a legal execution, the return by the sheriff to the writ; in the case of an equitable execution, the appointment of a receiver.

Legal execution where *elegit* has issued.

In the former case, if the judgment creditor wishes to enforce his remedy of a sale under the 4th section of the 27 & 28 Vict. c. 112, he must register his writ of *elegit* (*i*). In this case no difficulty to a purchaser arises, because the existence of a writ of *elegit* on the registry constitutes a blot on the title.

Where it has not.

But it may often happen that the judgment creditor is satisfied with having the lands delivered to him in execution,—as he thereby gets an effectual legal charge, and is enabled to apply the rents and profits towards the satisfaction of his debt,—and does not proceed to register the writ; the only object of this latter proceeding being to enable him to petition for a sale under section 4 (*k*). If he does not register his writ, there is nothing to show that the judgment has been executed by actual delivery of the lands. The intending purchaser may not even find any judgment registered, because registration of the judgment is not necessary for the purpose of obtaining execution. He then searches for writs of *elegit*, and finding none proceeds to make inquiry of the sheriff whether he has executed any *elegit* relating to the lands in question. But the sheriff is not bound to keep any registry or record of the writs delivered to him, or to answer any questions concerning them; and he may reasonably refuse to answer a question where an accidentally false answer may involve him in a possible law suit. If after this failure to elicit any material information the purchaser goes to the land itself to make inquiries on the spot, he finds it in the occupation of the vendor who is not likely to inform him that he is in occupation merely on sufferance, that the land has been delivered in execution, and that the rents are the property of his judgment creditor.

(*i*) S. 3. (*k*) *Re Page*, 17 Q.B.D. 743.

Equitable execution.

In the case of an equitable execution, the danger is still greater, because, as we have seen (*l*), a judgment creditor is not bound to sue out a writ of *elegit* as a preliminary to obtaining the appointment of a receiver by way of equitable execution, and may obtain such an appointment on an interlocutory application. A search for *elegit* will in this case show the intending purchaser nothing, nor has he any means of ascertaining that a receiver has been appointed: and the result of the most elaborate searches may very well be that he discovers nothing at all against the vendor and his lands. Even inquiry upon the spot need not disclose the existence of a receiver, as he may not be personally in possession, and the tenants even may have no knowledge of his existence.

Re Pope.

The danger to a purchaser in the case of an equitable execution has lately been forcibly illustrated by a case in the Court of Appeal (*m*). There a judgment had been obtained and registered against A. The judgment creditor, finding that the only lands belonging to A. were subject to an equitable mortgage, obtained the appointment of a receiver upon an interlocutory application. Four months later, A. conveyed the estate subject to the charge to B., who thereby got the legal estate, and had no notice of the receiver's appointment. It was held that the 27 & 28 Vict. c. 112, requires only delivery in execution in order to make the legal title effectual: that, the appointment of a receiver being equivalent to delivery of the lands, there was no need to register the appointment: and that B. was accordingly postponed to the judgment creditor.

Effect of *Re Pope.*

The result of this decision,—which, it is submitted, is a correct construction of the 27 & 28 Vict. c. 112,—is to import into every title an element of danger against which the most jealous searches and the most careful scrutiny cannot protect the purchaser. It only remains for the legislature to apply the simple remedy of making the registration of delivery in

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(*l*) *Ante*, p. 542.

(*m*) *Re Pope*, 17 Q. B. D. 743.

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execution, or of the appointment of a receiver, a condition precedent to lands being affected by a judgment as against purchasers.

When to be made in the names of prior owners.

Although, theoretically, a search ought to be made for five years preceding the sale in the names of former owners, with a view to the possibility of prior judgments having been entered up against them, and kept alive by re-registration (*ll*), it is not usual in practice, even on purchases in the Chancery Division, in the absence of special grounds for suspicion, to go back further than the last mortgagee or purchaser for value, it being assumed that proper searches were made on behalf of such mortgagee or purchaser; or to extend the searches to judgments against mortgagees or other incumbrancers, or mere equitable claimants upon the property (*lll*). In fact, as a rule, subject, of course, as every rule is, to occasional exceptions, the searches advised by counsel are theoretically imperfect and practically useless.

Searches in the Central Office.

As has been already (*m*) pointed out, the searches can now be made by delivering in the Central Office of the Supreme Court of Judicature a requisition for the searches required (*n*).

General remarks on the present state of the law.

This short review of the existing law of judgments naturally suggests the question, whether its benefits, as compared with its inconveniences, are such as to justify its continuance. The practice of entering up and registering a judgment as a security for money advanced, which had long fallen into desuetude, was virtually abolished by the Acts of 1860 and 1864; which, by depriving a judgment of its statutory force as a charge, unless immediate steps were taken to enforce it, rendered it impossible thus to create a continuing security on the land. The question, therefore, lies between those creditors who, in ordinary process of law, have recovered judgments

(*ll*) Not as against the debtor, in whose favour the Statute of Limitation runs. *Ex parte Lyon*, 15 Ch. D. 1[illegible]; *Ex parte O'Donnell*, 18 L. R. Ir. 170, *see ante*, p. [illegible]

(*lll*) See 18 & 19 V. c. 15, s. 11; *ante*, p. [illegible]

(*n*) *Ante*, p. 521.

(*o*) 15 & 16 V. c. [illegible], s. 2.

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(*ll*) Not as against the debtor, in whose favour the Statute of Limitations runs; *Re p. Tunte*, 15 Ch. D. 125; *Evans* v. *O'Donnell*, 18 L. R. Ir. 170; *see ante*, p. [illegible].

(*lll*) See 18 & 19 V. c. 15, s. 11; *ante*, p. 538.

(*m*) *Ante*, p. 521.

(*n*) 45 & 46 V. c. 39, s. 2.